

U.S. Department of Justice  
Executive Office for United States Trustees

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# Handbook for Chapter 13 Standing Trustees

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*December 1, 1998*



## Acknowledgments

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This Handbook should well serve to update and enhance the administration of chapter 13 cases.

Joseph Patchan  
Director  
Executive Office for United States Trustees

**HANDBOOK FOR STANDING TRUSTEES  
TABLE OF CONTENTS**

	<b>Page</b>
CHAPTER 1 – <u>INTRODUCTION</u> .....	1-1
A.    PURPOSE .....	1-1
B.    THE BANKRUPTCY LAW .....	1-1
C.    JURISDICTION AND VENUE .....	1-2
D.    ROLE OF THE UNITED STATES TRUSTEE .....	1-3
CHAPTER 2 – <u>APPOINTMENT AND QUALIFICATIONS OF THE STANDING TRUSTEE AND GENERAL REQUIREMENTS</u> .....	2-1
A.    ELIGIBILITY .....	2-1
B.    RECRUITMENT AND SELECTION .....	2-1
C.    SURETY BONDS .....	2-1
D.    TRAINING .....	2-2
E.    EVALUATION RECORD .....	2-3
CHAPTER 3 – <u>DUTIES OF A STANDING TRUSTEE</u> .....	3-1
A.    GENERAL .....	3-1
B.    SCREEN FOR CONFLICTS .....	3-2
C.    DUTY TO REVIEW FOR AND TAKE APPROPRIATE ACTION AGAINST PETITION PREPARERS .....	3-3
D.    DUTY TO REPORT AND REFER SUSPECTED BANKRUPTCY CRIMES .....	3-4
E.    STANDARDS OF CONDUCT .....	3-7
F.    PROHIBITION OF SOLICITATION OF GRATUITIES, GIFTS OR OTHER REMUNERATION OR THING OF VALUE .....	3-7
G.    PROHIBITION OF ADVERTISING .....	3-8
H.    DUTY TO COMPLY WITH APPLICABLE EMPLOYMENT RELATED LAWS .....	3-8
1.    Equal Opportunity Laws .....	3-8
2.    Sexual Harassment .....	3-8
3.    Fair Labor Standards Act .....	3-8
4.    Immigration Laws .....	3-8
5.    Americans with Disabilities Act .....	3-8
I.    DUTY TO PROVIDE INFORMATION TO INTERESTED PARTIES .....	3-9
J.    DEBTOR EDUCATION .....	3-9
K.    TRANSMISSION OF DOCUMENTS .....	3-10

**HANDBOOK FOR STANDING TRUSTEES  
TABLE OF CONTENTS**

	<b>Page</b>
CHAPTER 4 - <u>INITIAL REVIEW OF CHAPTER 13 CASES</u> .....	4-1
A.    INITIAL REVIEW OF PETITION AND SCHEDULES .....	4-1
B.    EXEMPTIONS .....	4-1
C.    REVIEW FOR § 109 ELIGIBILITY .....	4-2
1.    Domicile and Venue .....	4-2
2.    Debt Limits and Other Requirements .....	4-2
3.    Multiple Filings .....	4-3
CHAPTER 5 - <u>SECTION 341(a) MEETING</u> .....	5-1
A.    CONDUCTING THE MEETING .....	5-2
B.    RESCHEDULING AND CONTINUANCES .....	5-4
C.    NON-ATTENDANCE BY ATTORNEYS .....	5-4
D.    NON-ATTENDANCE BY DEBTORS .....	5-5
CHAPTER 6 - <u>ADMINISTRATION OF A CASE</u> .....	6-1
A.    FILING OF A PLAN .....	6-1
B.    CONTENTS OF A PLAN .....	6-1
C.    CONFIRMATION OF A PLAN .....	6-3
1.    Best Interests of Creditors Test (Liquidation Analysis) .....	6-3
2.    Feasibility Test .....	6-4
3.    Disposable Income Test .....	6-4
D.    DISBURSEMENTS .....	6-6
E.    WAGE ORDERS .....	6-6
F.    AVOIDANCE POWERS .....	6-6
1.    General Powers of the Standing Trustee .....	6-7
2.    Statutory Lien Avoidance .....	6-7
3.    Limitations on Avoidance Powers .....	6-7
4.    Preferences .....	6-7
5.    Fraudulent Transfers .....	6-8
6.    Post-Petition Transfers .....	6-8
7.    Setoff .....	6-9
G.    CLAIMS .....	6-9
1.    Classification of Claims .....	6-9
2.    Review of Claims .....	6-10
3.    Subordination of Claims .....	6-11
4.    Post-Petition Claims .....	6-12

**HANDBOOK FOR STANDING TRUSTEES  
TABLE OF CONTENTS**

	<b><u>Page</u></b>
H. FINAL REPORT .....	6-12
I. DISCHARGE .....	6-13
1. General .....	6-13
2. Hardship Discharge .....	6-13
3. Post-Petition Debts .....	6-14
 CHAPTER 7 - <u>MOTIONS TO DISMISS OR CONVERT</u> .....	 7-1
 CHAPTER 8 - <u>CHAPTER 13 DEBTORS ENGAGED IN BUSINESS</u> .....	 8-1
A. INTRODUCTION .....	8-1
B. IDENTIFYING THE CHAPTER 13 BUSINESS CASE .....	8-1
C. DUTIES OF A STANDING TRUSTEE IN A BUSINESS CASE ....	8-2
1. Applicable Code Sections .....	8-2
2. Trustee's Investigation of a Debtor Engaged in Business .....	8-2
3. Cost of Investigation and Retention of Professionals .....	8-3
4. Contents and Filing of the Investigative Statement or Summary .....	8-4
5. Periodic Monitoring .....	8-4
D. RIGHTS AND POWERS OF A CHAPTER 13 DEBTOR ENGAGED IN BUSINESS .....	8-5
E. DUTIES OF A CHAPTER 13 DEBTOR ENGAGED IN BUSINESS .....	8-5
1. Applicable Code Sections .....	8-5
2. Periodic Reports and Summaries of the Operation of the Business .....	8-6
F. EVALUATING ATTORNEY FEES IN A CHAPTER 13 BUSINESS CASE .....	8-6
 CHAPTER 9 - <u>FINANCIAL AND OPERATIONAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS</u> .....	 9-1
A. DEPOSIT AND INVESTMENT OF FUNDS .....	9-1
1. Types of Accounts .....	9-1
2. Pre-Confirmation Trust Account .....	9-1
3. Post-Confirmation Trust Account .....	9-2
4. Operating Expense Trust Account .....	9-2
5. Special Investment Accounts .....	9-2
6. Requirements Pertaining to Depositories .....	9-3

**HANDBOOK FOR STANDING TRUSTEES  
TABLE OF CONTENTS**

	<u>Page</u>
7. Collateralization of the Standing Trustee's Deposits .....	9-3
<b>B. FINANCIAL REPORTING AND RECORD KEEPING .....</b>	<b>9-5</b>
1. Characteristics of Accounting Procedures .....	9-5
2. Records to be Maintained by the Standing Trustee .....	9-6
<b>C. ACCOUNTING REPORTS .....</b>	<b>9-7</b>
1. Final Reports .....	9-7
2. Periodic Debtor Reports .....	9-7
3. Monthly Reports .....	9-7
4. Annual Reports .....	9-7
<b>D. SECURITY AND PERSONAL SAFETY CONSIDERATIONS .....</b>	<b>9-8</b>
<b>E. SPECIAL CONSIDERATIONS FOR COMPUTER SYSTEMS .....</b>	<b>9-8</b>
1. Selection of a Computer Service Provider .....	9-8
2. Accounting Manual and Systems Documentation .....	9-9
3. Security .....	9-9
<b>F. INTERNAL CONTROL FEATURES .....</b>	<b>9-10</b>
1. Personnel Management .....	9-10
2. Segregation of Duties .....	9-11
3. Monitoring Bank Accounts and Check Stock .....	9-12
4. Receipts .....	9-13
5. Handling Currency .....	9-14
6. Electronic Transfer of Funds .....	9-14
7. Disbursements .....	9-15
8. Maintaining Case Records .....	9-16
<b>G. TAXES .....</b>	<b>9-16</b>
1. Chapter 13 Debtors .....	9-16
2. Chapter 13 Operations .....	9-17
<b>H. ANNUAL AND AMENDED BUDGETS .....</b>	<b>9-17</b>
1. Operating Expense Line Items .....	9-19
2. Major Expenditures .....	9-26
3. Operating Reserve .....	9-26
4. Co-Trustee Operations .....	9-27
5. Facilities and Equipment .....	9-27
<b>I. INFORMAL BUDGET DISPUTE RESOLUTION .....</b>	<b>9-27</b>

**HANDBOOK FOR STANDING TRUSTEES  
TABLE OF CONTENTS**

	<b><u>Page</u></b>
CHAPTER 10 - <u>AUDITS, REVIEWS AND RECORDS</u> .....	10-1
A.    INDEPENDENT AUDITS .....	10-1
1.    Purpose and Frequency .....	10-1
2.    Selection and Compensation of the Audit Firm .....	10-1
3.    Entrance Conferences .....	10-1
4.    Exit Conferences and Follow Up .....	10-1
B.    MANAGEMENT REVIEWS .....	10-2
C.    RETENTION OF RECORDS .....	10-3
 CHAPTER 11 - <u>TRUSTEE COMPENSATION AND BENEFITS; CALCULATION OF PERCENTAGE FEE</u> .....	 11-1
A.    PAYMENT OF TRUSTEE COMPENSATION AND BENEFITS .....	11-1
B.    CALCULATION OF PERCENTAGE FEE .....	11-1
 CHAPTER 12 - <u>COMPLIANCE MEASURES</u> .....	 12-1
A.    REMEDIAL AND ENFORCEMENT ACTIONS .....	12-1
1.    Reduced Compensation Order .....	12-1
2.    Termination of Case Assignments .....	12-2
3.    Removal .....	12-2
4.    Recovery of Unauthorized Expenses or Excess Compensation .....	12-2
B.    PROCEDURES FOR SUSPENSION AND TERMINATION (28 C.F.R. 58.6) .....	12-2

**HANDBOOK FOR STANDING TRUSTEES  
APPENDICES**

- A. 28 C.F.R. §§ 58.3, 58.4, 58.5 and 58.6
- B. Evaluation Record
- C. Required and Sample Questions for use at § 341(a) Meetings for Individual Debtors
- D. Sample Questions for use at § 341(a) Meetings for Debtors Engaged in Business
- E. Sample Business Examination Checklists & Operating Report Forms
- F. Sample Statements of Business Investigations
- G. Sample General Ledger
- H. Sample Cash Receipts and Disbursements Journal
- I. Sample Periodic Debtor Reports
- J. Sample Monthly Report
- K. Annual Report Form & Instructions (1998)
- L. Employee Fraud Indicators
- M. Budget Form & Instructions (1998)
- N. Minimum Guidelines for Errors and Omissions Insurance
- O. Requirements for Employment Practices Liability Insurance
- P. Procedure and Forms for the Informal Budget Dispute Resolution

**CHAPTER 1**  
**INTRODUCTION**

## CHAPTER 1 – INTRODUCTION

### A. PURPOSE

The United States Trustee<sup>1\</sup> appoints and supervises standing trustees and monitors and supervises cases under chapter 13 of title 11 of the United States Code (“Bankruptcy Code”). 28 U.S.C. § 586. The goal of the United States Trustee is to establish a system that allows for the complete, economical, equitable and expeditious administration of chapter 13 cases, while allowing the standing trustee to exercise appropriate business and professional judgment in performing the standing trustee’s fiduciary duties.

This Handbook is a statement of operational policy and is intended as a working manual for the standing trustee. The Handbook is not intended to present a full and complete statement of the law. It should not be used as a substitute for legal research and analysis. The standing trustee must be familiar with the Bankruptcy Code, Federal Rules of Bankruptcy Procedure (“FRBP”), any local bankruptcy rules, and relevant case law.

All statutory references herein refer to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

### B. THE BANKRUPTCY LAW

The Bankruptcy Code consists of eight chapters:

Chapter 1:	General Provisions
Chapter 3:	Case Administration
Chapter 5:	Creditors, the Debtor and the Estate
Chapter 7:	Liquidation
Chapter 9:	Adjustment of Debts of a Municipality
Chapter 11:	Reorganization
Chapter 12:	Adjustment of Debts of a Family Farmer with Regular Annual Income; and
Chapter 13:	Adjustment of Debts of an Individual with Regular Income.

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1\ Unless otherwise noted, the term United States Trustee shall hereafter mean “the United States Trustee, or a designee of the United States Trustee.”

The provisions of chapters 1, 3, and 5 apply to all cases under chapters 7, 11, and 13 and, with the exception of § 361, apply to cases under chapter 12. The provisions of chapter 7, chapter 9, chapter 11, chapter 12, and chapter 13 apply only to cases under that specific chapter. The standing trustee is most involved with the provisions of chapters 1, 3, 5, and 13; but, since chapters 7, 11, and 12 cases may be converted to chapter 13 cases, familiarity with these chapters is essential.

### **C. JURISDICTION AND VENUE**

Pursuant to 28 U.S.C. § 1334, the district court has original and exclusive jurisdiction of all cases under title 11.

All bankruptcy cases and all proceedings arising under, arising in, or related to a title 11 case may be automatically referred by rule of the district court to the bankruptcy court, pursuant to 28 U.S.C. § 157. Section 157 makes further distinctions by the use of the terms "core" and "non-core" proceedings. The bankruptcy judge may hear and determine, subject to appeal, all cases under title 11 and core proceedings arising under or in a title 11 case. The bankruptcy judge may hear non-core proceedings, but the judge's findings of fact and conclusions of law are to be submitted to the district court for entry of the final order.

Four alternate tests for venue for a bankruptcy filing are presented in 28 U.S.C. § 1408:

1. the location of the debtor's domicile;
2. the location of the debtor's residence;
3. the location of the debtor's principal place of business in the United States; or
4. the location of the debtor's principal assets in the United States.

Venue is appropriate in the district in which one of the above tests has been satisfied for the 180-day period preceding the filing. If none of the above tests is satisfied for a 180-day pre-filing period, then venue is appropriate in the district in which one of the tests was satisfied for a longer portion of that period than in any other district. The standing trustee should be alert for cases purposely filed in an improper venue to accommodate the debtor's attorney, to inconvenience the debtor's creditors, or to obtain a perceived advantage in trustee or judge assignments. The standing trustee should report such cases to the United States Trustee.

If a case is filed in the proper district, the case may be transferred to any other district if the court determines that the transfer is in the best interest of justice or for the convenience of the parties. FRBP 1014(a)(1).

If a case is filed in an improper district, FRBP 1014(a)(2) provides for the transfer or dismissal of a case to another district in the interest of justice or for the convenience of the parties.

#### **D. ROLE OF THE UNITED STATES TRUSTEE**

A major reason for the enactment of the Bankruptcy Reform Act of 1978 was to remove the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties litigating against a bankruptcy trustee were concerned that the court, which previously appointed and supervised the trustee, may not be perceived to impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated.

The administrative functions were placed within the Department of Justice through the creation of the United States Trustee system. The United States Trustee acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. The United States Trustee works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.

Pursuant to 28 U.S. C. § 586, the United States Trustee shall:

1. establish, maintain and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;
2. serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;
3. supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11 by, whenever the United States Trustee considers it to be appropriate:
  - a. reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustees (which guidelines shall be applied uniformly by the United States Trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under § 330 of title 11; and filing with the court comments with respect to such applications and, if the United States Trustee considers it to be appropriate, objections to such application;
  - b. monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under §§ 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;

- c. monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under §§ 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans;
- d. taking such action as the United States Trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;
- e. monitoring creditors' committees appointed under title 11;
- f. notifying the appropriate United States Attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States Attorney, assisting the United States Attorney in carrying out prosecutions based on such actions;
- g. monitoring the progress of cases under title 11 and taking such actions as the United States Trustee deems to be appropriate to prevent undue delay in such progress;
- h. monitoring applications filed under § 327 of title 11 and, whenever the United States Trustee deems it to be appropriate, filing with the court comments with respect to the approval of such application;
- i. deposit or invest under § 345 of title 11 money received as trustee in cases under title 11;
- j. perform the duties prescribed for the United States Trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe; and
- k. make such reports as the Attorney General directs.

In addition, the Director of the Executive Office for United States Trustees, by delegation from the Attorney General, after consultation with the United States Trustee, fixes the standing trustee's maximum annual compensation and a percentage fee based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee. The standing trustee has no authority to negotiate compensation or a percentage fee other than that fixed by order of the Director.

## **CHAPTER 2**

# **APPOINTMENT AND QUALIFICATIONS OF THE STANDING TRUSTEE AND GENERAL REQUIREMENTS**

## **CHAPTER 2 – APPOINTMENT AND QUALIFICATIONS OF THE STANDING TRUSTEE AND GENERAL REQUIREMENTS**

The United States Trustee is authorized by law to appoint one or more individuals to serve as standing trustee in chapter 13 cases. 28 U.S.C. § 586 (b).

### **A. ELIGIBILITY**

To be eligible for appointment as a standing trustee, an individual must have the qualifications set forth in 11 U.S.C. § 321 and at 28 C.F.R. §§ 58.3 and 58.4. Appendix A. The trustee applicant must qualify to be bonded. Trustees must successfully undergo initial and five-year background checks. The proposed appointee must submit an employment application, SF-86 (Questionnaire for Sensitive Positions), DOJ-488 (Tax Check Waiver), FD-258 (Fingerprint Cards), I-9 (Employment Eligibility Verification), and a Form 555[a] (Disclosure and Authorization pertaining to Consumer Reports Pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681) to the United States Trustee.

### **B. RECRUITMENT AND SELECTION**

When seeking a new standing trustee, the United States Trustee conducts an open solicitation of persons interested in serving as the standing trustee. The United States Trustee follows applicable diversity policies and initiatives in the recruitment process.

Appointments are made on a non-discriminatory basis, as provided in 28 C.F.R. § 58.5. Trustee employment practices must also be non-discriminatory to the same extent as provided in 28 C.F.R. § 58.5, and all prospective employees should be so advised by the trustee. Appendix A.

The number of trustees to be appointed in any judicial district is within the discretion of the United States Trustee in consultation with the Director. The assignment of cases to standing trustees is also within the discretion of the United States Trustee subject to administrative review, when appropriate, pursuant to 28 C.F.R. § 58.6. Appendix A. The standing trustee must be able to administer cases and to carry out fiduciary duties free from influence or conflict.

### **C. SURETY BONDS**

Sections 322 and 1302 require the standing trustee to maintain a bond in favor of the United States conditioned on the faithful performance of official duties. Therefore, one of

the qualifications for appointment of an individual as standing trustee is the ability to be bonded. The amount of the bond and the sufficiency of the surety will be determined by the United States Trustee. 11 U.S.C. § 322(b)(2). The United States Trustee may approve one or more blanket bonds for the region. The standing trustee will be consulted concerning whether to procure an individual blanket bond or participate in an aggregate blanket bond.

Unless a group of standing trustees purchases a blanket bond in the aggregate, the minimum amount of the blanket bond for the standing trustee is 150% of the average monthly bank balances for the prior three months for all bank accounts, certificates of deposit or other permissible investments maintained by the trustee operation. The balances are to be determined from the bank records and reviewed monthly by the standing trustee and the United States Trustee. The standing trustee should discuss with the United States Trustee any significant increases in bank balances or any anticipated increase in funds. If the average monthly bank balances are such that the trustee's bond is less than 150% of those amounts, the standing trustee must confer with the United States Trustee. Adjustments to the bond should be made only as approved by the United States Trustee based upon significant increases or decreases in actual and projected bank balances. The amount of the aggregate blanket bond is calculated by the totaling of all bank accounts, certificates of deposit or other permissible investments maintained for all trustees included in the aggregate blanket bond on a particular day. After approval of the amount of the bond and the sufficiency of the surety, the original bond and any riders will be filed by the United States Trustee with the court.

The faithful performance surety bond of the standing trustee serves to protect the trust accounts from acts by the standing trustee or employees of the standing trustee to whom duties have been delegated. As an employer, the standing trustee should obtain a reasonable amount of fidelity coverage on employees. The fidelity coverage may be included as part of a general office insurance package along with contents and general liability or a separate blanket position fidelity bond may be procured. Coverage limits will be reviewed by the United States Trustee as part of the budget process.

#### **D. TRAINING**

The United States Trustee provides ongoing training for all trustees. The training should help the standing trustee keep abreast of recent developments in bankruptcy law and issues which affect chapter 13 administration. Training covers standards and other requirements for trustee performance, including record keeping and reporting. The training for a new standing trustee may include visiting or working in an existing trustee's office prior to case assignments and periodic one-on-one training with the United States Trustee thereafter, as needed. A standing trustee may request specific types of training from the United States

Trustee, including participation in an ongoing mentoring program with an experienced standing trustee.

## **E. EVALUATION RECORD**

The United States Trustee prepares a formal annual written review of the standing trustee's performance. The review monitors the standing trustee's competency, adherence to fiduciary standards, and commitment to effective case administration for the benefit of creditors. The annual performance review is based upon a variety of factors, including (but not limited to):

1. preparation and filing of timely, complete and accurate monthly reports with bank account information;
2. standing trustee's performance in § 341(a) meetings, investigation of the financial affairs of the debtor and, when appropriate, making criminal referrals;
3. substantive case administration including filing appropriate pleadings and performing effectively in court;
4. response to inquiries from the public and parties in interest and the number and nature of complaints against the standing trustee as well as the standing trustee's responsiveness in addressing the complaints;
5. filing of budgets, annual reports and final reports as well as the judicious use of expense funds;
6. response to audits, site visits and reviews as well as response to requests of the United States Trustee; and
7. maximizing and safeguarding of trust assets and investments as well as compliance with the requirements of the United States Trustee for banking and bonding.

The standing trustee will receive a copy of the evaluation record and may discuss it with the United States Trustee personally. Any written response by the standing trustee concerning issues raised in the evaluation record will become part of the United States Trustee's standing trustee oversight file, which will be made available to the standing trustee upon request. Appendix B.

## **CHAPTER 3**

# **DUTIES OF A STANDING TRUSTEE**

## **CHAPTER 3 – DUTIES OF A STANDING TRUSTEE**

### **A. GENERAL**

The standing trustee has a fiduciary responsibility to the debtor and all classes of creditors in each case. The standing trustee is more than a mere disbursing agent. The standing trustee must be personally involved in carrying out the statutory duties and other fiduciary responsibilities of the standing trustee operation. If the standing trustee is or becomes unable to be directly involved in the performance of these duties and responsibilities, the standing trustee must advise the United States Trustee immediately.

The statutory duties of the standing trustee are set forth in part in §1302 which incorporates by reference some of the duties of chapter 7 trustees set forth in § 704. These duties include, but are not limited to, the requirements that the standing trustee:

1. be accountable for all property received [§ 704(2)];
2. investigate the financial affairs of the debtor [§ 704(4)];
3. if a purpose would be served, examine proofs of claim and object to the allowance of any claim that is improper [§ 704(5)];
4. if advisable, oppose the discharge of the debtor [§ 704(6)];
5. unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest [§ 704(7)];
6. make a final report and file a final account of the administration of the estate with the United States Trustee and the court [§ 704(9)];
7. appear and be heard at any hearing that concerns
  - a. the value of property subject to a lien [§ 1302(b)(2)(A)];
  - b. confirmation of a plan [§ 1302(b)(2)(B)]; or
  - c. modification of the plan after confirmation [§ 1302(b)(2)(C)].
8. advise, other than on legal matters, and assist the debtor in performance under the plan [§ 1302(b)(4)];

9. ensure that the debtor commences making timely payments under § 1326 of this title [§ 1302(b)(5)]; and

10. if the debtor is engaged in business, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan [§ 1106(a)(3)]. Once the investigation is completed, the standing trustee shall file a statement of the investigation. [§ 1106(a)(4)(A), § 1302(c).]

## **B. SCREEN FOR CONFLICTS**

The standing trustee must be knowledgeable of 11 U.S.C. § 101(14), which defines "disinterested person," and 11 U.S.C. § 101 (31), which defines "insider," and must decline any appointment in which the standing trustee has a conflict of interest, lacks disinterestedness, or is an insider. Conflicts of interest include, without limitation, the representation by a standing trustee's firm of a debtor or any party in interest in any chapter 13 case being administered by the chapter 13 trustee. Further, a conflict exists if the representation of a client by a standing trustee or the standing trustee's firm requires the standing trustee to take a position contrary to the fiduciary responsibilities of a standing trustee. If the standing trustee discovers a conflict after accepting an appointment, the standing trustee must immediately file a notice of resignation in the case and notify the United States Trustee, who will reassign the case to another person. Conflict waivers by either the debtor or a creditor are not effective to obviate the necessity for the trustee to resign.

To the extent that a standing trustee has a large number of resignations due to conflicts, the United States Trustee, with the approval of the Director, may appoint another standing trustee.

In order to address conflicts of interest, the standing trustee must:

1. review each case assigned as soon as possible after appointment, but in any event prior to the § 341(a) meeting, for actual or potential conflicts, including prior representations of either the debtor or any creditors;
2. advise the United States Trustee in writing of any such actual or potential conflicts upon becoming aware of them; and disclose any potential conflicts on the court record and/or at the § 341(a) meeting, or both; and
3. decline any appointment or immediately resign if there is an actual conflict or lack of disinterestedness.

If the standing trustee is otherwise engaged in another occupation or business, or is affiliated with an entity that conducts a business or practice that provides services or products to debtors or creditors, the standing trustee must promptly disclose in writing to the United States Trustee all relevant details of those interests.

### **C. DUTY TO REVIEW FOR AND TAKE APPROPRIATE ACTION AGAINST PETITION PREPARERS**

In 1994, Congress enacted legislation to regulate the conduct of persons other than attorneys or their employees who assist debtors in preparing bankruptcy petitions. Section 110 requires a bankruptcy petition preparer to disclose its name, address, social security number, and fee. It prohibits a preparer from signing documents for debtors, from collecting fees if court fees have not been paid, and from using the word "legal" or similar terms in advertisements. It requires a preparer to provide a copy of the bankruptcy documents to the debtor at least by the time that documents are presented for the debtor's signature. The section also authorizes the court to order the return of excessive fees. The court may impose fines of up to \$500 for each statutory violation.

Section 110 also provides remedies to address certain petition preparer abuses. Damages include the debtor's actual damages, the greater of \$2,000 or twice the amount the debtor paid for the preparer's service, and reasonable attorney's fees and costs. A standing trustee can pursue actions under this section and may receive an additional \$1,000 plus reasonable attorney's fees and costs. Any monies recovered pursuant to this statute should be deposited into the expense fund or as otherwise directed by the court.

The petition preparer statute also authorizes injunctive relief against a preparer under certain circumstances. Cases which are dismissed as the result of a preparer's knowing attempt to disregard bankruptcy requirements subject the preparer to criminal liability under 18 U.S.C. § 156.

Nothing in § 110 shall be construed to permit activities otherwise prohibited by law, including rules and laws prohibiting the unauthorized practice of law. The standing trustee should identify and refer to the United States Trustee all cases with potential § 110 violations and, if appropriate, make referrals to the state bar or other state authorities.

The standing trustee should be aware of applicable case law and precedent regarding the unauthorized practice of law.

## **D. DUTY TO REPORT AND REFER SUSPECTED BANKRUPTCY CRIMES**

Title 18 U.S.C. § 3057 of the United States Code requires a standing trustee to report suspected violations of federal criminal law to the appropriate United States Attorney. Title 28 U.S.C. § 586 imposes a similar duty on the United States Trustee to refer any matter that may constitute a violation of criminal law to the United States Attorney and, upon request, to assist the United States Attorney in prosecuting the matter.

It is important that a standing trustee and the United States Trustee coordinate efforts in the criminal referral process. Depending upon local practice, a standing trustee should submit the referral to the United States Attorney through the United States Trustee or furnish a copy to the United States Trustee. The mechanics of this referral should be discussed with the United States Trustee. Each United States Trustee has developed specific procedures with the local offices of the United States Attorney and the Federal Bureau of Investigation.

The standing trustee is often in the best position to initially identify fraud or criminal activity in chapter 13 cases. When criminal activity is suspected, the standing trustee should notify the United States Trustee immediately.

The initial review of bankruptcy schedules may alert the standing trustee to potential crimes. When evaluated in light of other information, schedules and statements may indicate sham or fraudulent transactions, such as creation of false secured creditors, gross undervaluation of assets, sudden depletion of inventory, fraudulent transfers to fictitious entities (e.g., affiliates) or incurring of significant trade debt shortly before the filing.

Various interested parties may contact the standing trustee with allegations of fraud. For example, former employees or former business associates may have knowledge of undisclosed assets that the debtor failed to list on the schedules (e.g., assets transferred on the eve of bankruptcy). Another prime source of information may be ex-spouses or trade creditors who have information about assets which the debtor described in other court proceedings, for example in a property settlement agreement, or in a financial statement, but failed to list on the bankruptcy schedules.

In appropriate cases, the standing trustee may discover potential criminal violation through the review of records such as financial statements, UCC filings and title searches, insurance records, divorce files, bank loan files, proofs of claim, and tax returns. The standing trustee may discover gross discrepancies between assets identified in these documents and the debtor's documentation on the bankruptcy schedules and statements.

The § 341(a) examination of the debtor is another important opportunity to discover potential criminal activity. While the debtor is under oath, the standing trustee may acquire

or develop facts that may indicate a potential bankruptcy related crime. For example, a debtor could lie during questioning concerning recent repayments of debts, gifts or transfers to insiders. In all cases where the standing trustee suspects criminal activity after questioning at the § 341(a) meeting, the standing trustee should immediately notify the United States Trustee so that the § 341(a) meeting tape may be properly secured and stored to preserve its later use in a criminal proceeding.

The most common bankruptcy crimes are set forth in 18 U.S.C. § 152. All of the crimes in this section require that the acts have been done "knowingly and fraudulently." Section 152 makes it a crime for any individual to "knowingly and fraudulently" 1) conceal property; 2) make a false oath or account in relation to a bankruptcy case; 3) make a false declaration, certification, verification or statement in relation to a bankruptcy case; 4) make a false proof of claim; 5) receive a material amount of property from the debtor with intent to defeat the Bankruptcy Code; 6) give, offer, receive or attempt to obtain money, property, reward or advantage for acting or forbearing to act in a bankruptcy case; 7) transfer or conceal property with the intent to defeat the Bankruptcy Code; 8) conceal, destroy, mutilate or falsify documents relating to the debtor's property or affairs; or 9) withhold documents related to the debtor's property or financial affairs from the standing trustee or other officer of the court.

Persons other than the debtor may commit bankruptcy crimes. During the course of the administration of the estate, the standing trustee may also become aware of potential theft or embezzlement by professionals (e.g., appraisers, auctioneers, attorneys) or by the standing trustee's own employees.

Title 18 U.S.C. § 153 and § 154 are specifically directed to the standing trustee or other officer of the court. Section 153 relates to the knowing and fraudulent misappropriation, embezzlement or transfer of property, or destruction of any estate document, by the standing trustee or other officer of the court. The Bankruptcy Reform Act of 1994 broadened the scope of those affected by this statute to include an agent, employee or other person engaged by the standing trustee or officer of the court.

Title 18 U.S.C. § 154 prohibits a standing trustee or other officer of the court from knowingly purchasing, directly or indirectly, any property of the estate of which such person is a trustee or officer; or the knowing refusal to permit a reasonable opportunity for the inspection of estate documents or accounts when directed by the court to do so. It also specifically identifies the United States Trustee as the only party in interest who does not require a court order directing the standing trustee or court officer to permit a reasonable opportunity for inspection. 18 U.S.C. § 154(3).

18 U.S.C. § 155 makes it a crime for any party in interest or the attorney of a party in interest to knowingly and fraudulently enter into an agreement with another party in interest or their attorney, for the purpose of fixing the fee or compensation to be paid to them for services rendered in connection therewith, from assets of the estate.

The Bankruptcy Reform Act of 1994 added 18 U.S.C. § 156, "Knowing Disregard of Bankruptcy Law or Rule," and 18 U.S.C. § 157, "Bankruptcy Fraud." Section 156 makes it a misdemeanor if a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a "bankruptcy petition preparer" in any manner to disregard the requirements of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure. A bankruptcy petition preparer does not include a debtor's attorney or an employee of such attorney, but applies to a person who prepares for compensation a document for filing by a debtor in Bankruptcy or District Court.

Section 157 is similar to the federal mail fraud and wire fraud statutes in that it requires a person to devise or intend to devise a scheme or artifice to defraud. A person, not only a debtor, commits bankruptcy fraud if, for the purpose of executing or concealing this scheme or artifice to defraud, that person:

1. files a petition under title 11;
2. files a document in a proceeding under title 11; or
3. makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title.

There are several other criminal statutes that may be relevant to bankruptcy related crimes including those relating to bank fraud, tax fraud, mail and wire fraud, and money laundering. The United States Trustee has available additional information on these statutes.

In making a criminal referral, it is important to provide as much specific factual and documentary information as possible. At a minimum, the referral should include:

1. the bankruptcy case name, file number and chapter;
2. a chronological summary including dates and specific facts related to the who, what, where, when and how of the suspected crime;
3. a brief narrative of what occurred in relation to each allegation referring to copies of relevant documents;

4. an estimate of the amount of loss involved;
5. specification of the statutory provisions applicable to the matter;
6. names, addresses, phone numbers, titles, and descriptions of all persons involved;
7. copy of all written documents relevant to the allegations; and
8. a statement of other related referrals made to law enforcement agencies.

In the event the standing trustee suspects or finds that one of the employees of the standing trustee has committed theft or embezzlement, the standing trustee must immediately notify the United States Trustee who has in place procedures for investigating and handling such problems. The standing trustee must cooperate with the United States Trustee in the investigation and institute all procedures directed by the United States Trustee concerning such allegations.

#### **E. STANDARDS OF CONDUCT**

The standards of conduct for the standing trustee are set forth in 28 CFR § 58.4 and are attached in Appendix A.

#### **F. PROHIBITION OF SOLICITATION OF GRATUITIES, GIFTS OR OTHER REMUNERATION OR THING OF VALUE**

Neither the standing trustee nor any employee of the standing trustee may solicit or accept any gratuity, gift, or other remuneration or thing of value from any person with whom the standing trustee deals in the performance of the standing trustee's duties and responsibilities. An exception may be made if the gift is of nominal value and in connection with a holiday or special event.

Neither the standing trustee nor any employee of the standing trustee may purchase assets of the trustee operation.

The standing trustee may not act as agent for companies providing services or products to debtors. For example, the standing trustee may not receive commissions or any form of remuneration for recommending or referring debtors to particular insurance companies, nor make any claim for commissions on any premiums paid to an insurance company by chapter 12 or 13 debtors. Likewise, the standing trustee may not earn commissions or fees for the referral of debtors to debtor schools, to credit counselors or for providing debtor education.

The standing trustee and the employees of the office of the standing trustee shall sign and submit to the United States Trustee an annual certification of compliance with this section.

#### **G. PROHIBITION OF ADVERTISING**

The standing trustee may not advertise in newspapers or other public information media, or take any other action that could reasonably be interpreted as encouraging debtors to file petitions under chapter 13 of the Bankruptcy Code. Subject to the approval and guidance of the United States Trustee, a standing trustee may disseminate information to interested persons about chapter 13, and may participate in meetings, educational seminars, or institutes concerning chapter 13.

#### **H. DUTY TO COMPLY WITH APPLICABLE EMPLOYMENT RELATED LAWS**

The standing trustee must comply with all applicable federal, state and local employment related laws. The following federal laws may apply:

- 1. Equal Opportunity Laws:** The standing trustee must maintain a workplace free of discrimination. The standing trustee must comply with all applicable equal opportunity laws and must not discriminate against employees or job applicants on the basis of race, color, religion, sex, national origin, age or disability.
- 2. Sexual Harassment:** The standing trustee must be provide a work environment that is free of discrimination and unlawful harassment. A complaint procedure should be established and included in the operation's personnel manual. Employees should be made aware of complaint procedures.
- 3. Fair Labor Standards Act:** The standing trustee must comply with the Fair Labor Standards Act and any applicable state or local employment laws.
- 4. Immigration Laws:** The standing trustee must comply with the Immigration Reform and Control Act of 1986 and must employ only United States citizens and aliens who are authorized to work in the United States. The standing trustee must not unlawfully discriminate on the basis of citizenship or national origin.
- 5. Americans with Disabilities Act:** The standing trustee must comply with the Americans with Disabilities Act to the extent applicable.

#### **I. DUTY TO PROVIDE INFORMATION TO INTERESTED PARTIES**

Sections 704(7) and 1302 require the standing trustee to furnish information concerning a case and case administration as requested by a party in interest. Section 1302 also requires the standing trustee to advise the debtor on non-legal matters and to assist the debtor in performance under the plan. The standing trustee is not to assess a separate charge for responding to inquiries by interested parties or assisting the debtor. The cost of performing this statutory duty is covered by the percentage fee fixed under § 586(e).

A standing trustee should have staff and procedures in place to ensure that case information is reasonably and promptly available, at no cost to debtors, creditors and other interested parties, during business hours. Examples of information to be made available include debtors' names, addresses, dates of filing, § 341(a) meetings, confirmation status, case status (e.g., dismissed, converted, closed on completion of plan, etc.), plan payments, claims, disbursements to creditors, other items of information which are generally disclosed through the court dockets and files, trustee's final reports, and motions which may be filed by a standing trustee. In fulfilling the standing trustee's duty to furnish information, a standing trustee may direct parties to the clerk's office to obtain copies or other information not reasonably or readily available at the office of the standing trustee.

## **J. DEBTOR EDUCATION**

The United States Trustee supports the financial education of debtors. A standing trustee may be authorized to expend trust funds to establish a debtor education program. These programs should provide the debtor general information about the bankruptcy system, including the rights and duties of chapter 13 debtors, together with information about personal finances, development of family budgets, and any information necessary to assist the debtor in completion of the chapter 13 plan.

To request authorization to develop a program, a standing trustee should research the available resources and present a plan and budget to the United States Trustee. The plan should cover at least the following items: objectives; facilities; personnel; curriculum and materials; the frequency with which the classes are scheduled; target audience size; measures of effectiveness; and cost.

In developing a debtor education program, a standing trustee should consider all existing available resources, including volunteer and non-profit agencies. For example, some communities have available programs developed by local colleges and universities, as well as agricultural extension programs. In addition, volunteer experts may be located through the Small Business Administration, local banks or insurance companies. For convenience purposes, non-profit agencies may make space, parking and child care available for the classes.

## **K. TRANSMISSION OF DOCUMENTS**

In the administration of a case, the standing trustee should transmit to the United States Trustee a copy of all notices, motions, applications, pleadings and orders filed by the standing trustee (unless otherwise notified by the United States Trustee). FRBP 2002(k).

Claims should be handled in accordance with FRBP 3002 and 5005 and applicable local rules.

## **CHAPTER 4**

### **INITIAL REVIEW OF CHAPTER 13 CASES**

## **CHAPTER 4 - INITIAL REVIEW OF CHAPTER 13 CASES**

### **A. INITIAL REVIEW OF PETITION AND SCHEDULES**

The standing trustee is responsible for reviewing the sufficiency of the petition, matrix or list of creditors' names and addresses, and statements and schedules.

The debtor's petition must include the debtor's name, social security number, employer's tax identification number and all other names used by the debtor within six years prior to the filing. FRBP 1005.

In addition to the petition, the following schedules and statements must be filed:

- Schedule A - Real Property
- Schedule B - Personal Property
- Schedule C - Property Claimed as Exempt
- Schedule D - Creditors Holding Secured Claims
- Schedule E - Creditors Holding Unsecured Priority Claims
- Schedule F - Creditors Holding Unsecured Non-priority Claims
- Schedule G - Executory Contracts and Unexpired Leases
- Schedule H - Co-debtor
- Schedule I - Current Income of Individual Debtor(s)
- Schedule J - Current Expenditures of Individual Debtor(s)
- Statement of Financial Affairs

If the schedules and statements do not accompany the petition, the petition should, at a minimum, be submitted with a list containing the names and addresses of all the debtor's creditors. If such a list is filed, FRBP 1007(c) grants the debtor fifteen days from the filing to supply complete schedules and statement(s) of affairs. The standing trustee must review notice of any requests for an extension of time to file documents. FRBP 1007(a)(4) and (c).

In addition, the standing trustee is to review the documents pertaining to fees for the debtor's attorney or petition preparer pursuant to § 110(h)(1), § 329, § 330 and FRBP 2016(b) and local rules and practice. In most districts, the clerk, United States Trustee, and trustees have developed procedures for monitoring submission of these documents and taking action in the event of non-compliance.

### **B. EXEMPTIONS**

In order to obtain exemptions, a debtor must list property claimed as exempt on the schedule of assets filed with the court. FRBP 4003(a). If it serves a purpose, the standing

trustee must file objections to improper exemptions within 30 days after the conclusion of the § 341(a) meeting or following the filing of any amendment to the list or supplemental schedules, unless further time is applied for and granted within the 30-day period. FRBP 4003(b). If allowing the improperly claimed exemption would decrease the amount of funds available to creditors under the liquidation analysis, the standing trustee should file a timely objection. If the trustee does not file a timely objection to an exemption, it is deemed allowed. See Taylor v. Freeland and Kronz, 503 U.S. 638 (1992). The objecting party has the burden of proving that the exemptions are not properly claimed.

The standing trustee should use the § 341(a) meeting to gain information on the debtor's claimed exemptions. FRBP 1009 allows the debtor to amend the bankruptcy schedules as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the standing trustee and to any entity affected thereby. Specific exemptions are not addressed in depth in this Handbook. Section 522 sets forth allowable exemptions under federal bankruptcy law. The standing trustee must know whether the forum state has opted out of the federal exemptions. If a state has opted out, the state property exemptions apply instead of those provided in § 522(d), although other non-bankruptcy federal exemptions will apply.

## **C. REVIEW FOR § 109 ELIGIBILITY**

The standing trustee should review each case to verify the debtor's eligibility for chapter 13 relief under § 109. The standing trustee should refer to controlling case law or treatises for a more comprehensive understanding of the eligibility requirements.

### **1. Domicile and Venue**

Section 109(a) states that only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title. Further, even though domicile may be proper under § 109(a), the trustee should still review whether venue is appropriate under 28 U. S.C. § 1408. See section I.C. supra.

### **2. Debt Limits and Other Requirements**

Eligibility to file a petition under chapter 13 is governed by §109(e). As of April 1, 1998, only an individual with regular income that owes, on the date of filing of the petition, noncontingent, liquidated, unsecured debts of less than \$269,250 and noncontingent, liquidated, secured debts of less than \$807,750, or an individual with regular income and such individual's spouse, except a stockbroker and commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated,

unsecured debts that aggregate less than \$269,250 and noncontingent, liquidated, secured debts of less than \$807,750 may be a debtor under chapter 13. Pursuant to § 104(b)(1), these dollar amounts were adjusted, beginning April 1, 1998, and are to be adjusted at each 3-year interval ending on April 1 thereafter to reflect the change in the Consumer Price Index. The standing trustee should be familiar with the current debt limits. The previous debt limits for eligibility to file a petition under chapter 13 were \$250,000 and \$750,000, respectively.

### **3. Multiple Filings**

No individual may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if:

- a. the case was dismissed by the court for willful failure of the debtor to abide by the orders of the court, or to appear before the court in proper prosecution of the case; or
- b. the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by § 362 of this title. § 109(g).

The standing trustee should review the petition and the standing trustee's database with respect to each case to determine if the debtor has previously filed bankruptcy or is a debtor in any other pending case. The standing trustee may consider reviewing other available sources such as PACER for previous filings. Prior or pending filings may be indicative of bad faith and, if so, the standing trustee should take appropriate action.

## **CHAPTER 5**

### **SECTION 341(a) MEETING**

## **CHAPTER 5 - SECTION 341(a) MEETING**

The meeting of creditors provided for in § 341(a) is the official forum where the debtor must appear and answer questions regarding the case under oath from the standing trustee, creditors, and other parties in interest. The standing trustee, as designee of the United States Trustee, is the presiding officer at the § 341(a) meeting. The standing trustee may not delegate the duty to preside at the § 341(a) meetings. However, upon prior approval, confirmed in writing, the United States Trustee may designate another person to preside. If the United States Trustee designates another to serve as the presiding officer at § 341(a) meetings, the standing trustee is responsible to ensure that the designated substitute presiding officer is qualified and trained to conduct the § 341(a) meeting. The designated substitute presiding officer should have conducted § 341(a) meetings in the presence of the standing trustee prior to presiding at § 341(a) meetings outside the presence of the standing trustee. The standing trustee must periodically review tapes of § 341(a) meetings conducted by the designated substitute presiding officer to assure that the § 341(a) meetings are conducted in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the standing trustee's instructions.

The standing trustee shall assure the prompt scheduling and noticing of the § 341(a) meeting within the time provided by FRBP 2003.

The § 341(a) meeting serves to ensure that the debtor understands the obligations imposed by the Code and the plan and is for the additional benefit of creditors and parties in interest. It presents the opportunity for the standing trustee, creditors and other interested parties to hear from and to question the debtor regarding assets and liabilities. The meeting provides information about the debtor's financial situation in detail through questioning. Individuals who represent a creditor but who are not attorneys may be present at the meeting. Generally, the standing trustee should permit these persons to examine the debtor. Some jurisdictions, however, may view this as the unauthorized practice of law. The standing trustee should be guided by controlling legal authority.

The standing trustee should consult with the United States Trustee for the general procedures to be followed if a debtor does not appear in person at the § 341(a) meeting. Each United States Trustee has procedures in place, such as telephonic meetings under oath, to handle extenuating circumstances which prevent a debtor from personally appearing. The circumstances may include military service, terminal illness, or incarceration. See section V. D. for further information concerning non-attendance by a debtor.

Neither the standing trustee nor the United States Trustee has legal authority to waive the requirement for appearance of a debtor at the § 341(a) meeting.

If the standing trustee becomes aware of a debtor's physical disability, such as a hearing impairment, the standing trustee is to notify the United States Trustee immediately. The United States Trustee,

in consultation with the debtor and the standing trustee, shall determine the reasonable accommodation to be made.

There is no statutory obligation to provide language interpreters at § 341(a) meetings. However, the standing trustee should attempt to communicate with a non-English speaking debtor by seeking the assistance of third parties such as attorneys and family members. All parties who interpret testimony must be placed under oath in accordance with Rule 604 of the Federal Rules of Evidence. If a non-English speaking debtor is unable to communicate with the standing trustee, the standing trustee should consult with the United States Trustee for guidance.

All § 341(a) meetings must be electronically recorded pursuant to FRBP 2003(c). The standing trustee is responsible for ensuring that the recording equipment is operating properly. The tape recording shall be maintained in accordance with FRBP 2003(c).

## **A. CONDUCTING THE MEETING**

The scope of the § 341(a) meeting is broad, as described in FRBP 2004(b). The role of the standing trustee at these meetings is to conduct the meeting in an orderly, yet flexible manner, and to provide for liberal questioning of the debtor as to matters affecting the debtor's financial affairs and conduct. The standing trustee's demeanor toward all parties should be appropriate and professional.

Representatives of the media are permitted to be present, but no one is permitted to electronically record the meeting other than the United States Trustee, the standing trustee or a certified court reporter. Neither is anyone to televise, make video tapes, or photograph the debtor or any party at the meeting. During the § 341(a) meeting, the standing trustee should not answer questions seeking legal advice, and should avoid actions which would result in the perception that the standing trustee is a judge or has judicial power.

The standing trustee must exercise control over the demeanor of the debtors, attorneys, and creditors during the course of the § 341(a) meeting. Uncooperative or recalcitrant debtors should be reminded of their duties under § 521 of the Code and FRBP 4002, especially the duty to cooperate with the standing trustee in the administration of the case. The standing trustee should announce that testimony is being recorded on a tape recorder and that there should not be any disturbances during the course of the meeting. The standing trustee must require parties to speak clearly, adequately identify themselves and, if necessary, obtain the spelling of the names of any parties entering their appearance on the record .

At the beginning of each § 341(a) session, the standing trustee should make an introductory statement. A suggested introductory statement is:

"My name is \_\_\_\_\_, and I have been appointed by the United States Trustee, an officer of the United States Department of Justice, to serve as standing trustee in the cases scheduled for this morning/afternoon. I will preside at these meetings and examinations of the debtors. All debtors present must be examined under oath. All persons appearing must sign the appearance sheet. All persons questioning the debtor must state their names and whom they represent for the record, and speak clearly. The examinations will be electronically recorded and all testimony is under penalty of perjury."

The standing trustee must administer the oath to each debtor individually by requiring the debtor to raise his or her right hand and respond affirmatively to the presiding officer's questions seeking an oath or affirmation in accordance with Rule 603 of the Federal Rules of Evidence. Any interpreter should be sworn in accordance with Rule 604 of the Federal Rules of Evidence.

The standing trustee shall not administer the oath to debtors collectively. The oath is to be administered to each debtor separately; however, husband and wife may be sworn together.

FRBP 2003(b) states that the presiding officer has the authority to administer oaths. There is no requirement that the standing trustee be a notary, or bring a notary to the meeting to administer the oath.

The standing trustee should examine the debtor to the extent appropriate to determine the existence of assets, the value of property subject to a lien, transfers, exemptions, feasibility, disposable income, whether the debtor's proposed plan is in the best interest of creditors (liquidation analysis) and other matters.

Sample questions for use at § 341(a) meetings for individual debtors and debtors engaged in business are provided in Appendices C and D.

If a debtor asserts the fifth amendment privilege in response to a particular question, the standing trustee should proceed with the meeting and continue to question the debtor. The standing trustee should make a record of questions even if the fifth amendment is asserted if testimony is sought to be compelled. At the conclusion of the questioning, the meeting is to be adjourned or continued and the United States Trustee advised. (See Handbook section V. B. on Rescheduling and Continuances for additional information.) The United States Trustee will, if appropriate, advise the United States Attorney who may take appropriate action to seek a grant of immunity. If the claim of privilege is not well founded, the standing trustee should seek an order from the court compelling testimony or granting such other relief as may be appropriate, such as dismissal of the case or denial of discharge.

After the standing trustee has completed the examination, the standing trustee should inquire if there are any creditors or parties in interest present who wish to ask questions and permit those persons to do so. Parties should not be permitted to take more than a reasonable period of time to make inquiries at the meeting because they can use other procedural means to obtain information. Parties may use discovery, such as examination provided under FRBP 2004, to obtain more detailed information. Cases requiring more time may be adjourned temporarily in order to finish more routine cases. The lengthy case should be reconvened at the end of the calendar, or, if necessary, adjourned or continued to another day.

Depending upon the requirements of the United States Trustee, the standing trustee may be required to complete a record of the proceeding, such as a minute sheet, for each case. If required, a copy must be filed promptly with the United States and with the clerk of the bankruptcy court, if the clerk so requests. The standing trustee should retain a copy.

## **B. RESCHEDULING AND CONTINUANCES**

The standing trustee should consult with the United States Trustee about the local rules and practices governing debtor rescheduling requests and continuances. The standing trustee should conclude the § 341(a) meeting promptly so that the case can proceed expeditiously.

The standing trustee is discouraged from continuing a meeting once the notice has been issued. If the standing trustee must continue the meeting, however, the standing trustee should, if at all possible, announce the continued date to all parties present at the initial meeting, and advise the United States Trustee, if requested, of the continued date.

## **C. NON-ATTENDANCE BY ATTORNEYS**

If a debtor's attorney fails to appear, the standing trustee may either continue the meeting or proceed with questioning the debtor. Ordinarily, the standing trustee should continue the meeting; however, there may be circumstances which would warrant proceeding with questioning. Such circumstances may include the presence of creditors at the meeting. The standing trustee should consider filing a motion under § 329(b) to compel a refund of the fees received by an attorney who unjustifiably fails to appear.

#### **D. NON-ATTENDANCE BY DEBTORS**

The debtor must attend the § 341(a) meeting. This is true even if no creditors attend. Neither the standing trustee nor the United States Trustee may waive the requirement for the appearance of the debtor at the § 341(a) meeting.

When spouses have filed jointly, the Code requires both debtors to attend the § 341(a) meeting. The standing trustee should consult with the United States Trustee regarding the procedure to be followed when one spouse does not appear.

Depending on the situation and local rules and practices, when a debtor fails to appear, the standing trustee may:

1. continue the § 341(a) meeting to another calendar date and notify the United States Trustee, if requested, of the new date;
2. file a motion to dismiss or convert the case; or
3. follow other appropriate procedures as suggested by the United States Trustee.

# **CHAPTER 6**

## **ADMINISTRATION OF A CASE**

## **CHAPTER 6 - ADMINISTRATION OF A CASE**

### **A. FILING OF A PLAN**

The debtor is required to file a plan no later than 15 days after the filing of the petition or conversion to chapter 13 from another chapter. Section 1321 and FRBP 3015(b). Every plan must be dated. The 15 day deadline may not be extended except for cause shown and on notice as the court may direct. The standing trustee should monitor the debtor's obligation to timely file a plan and should take appropriate action if the debtor fails to comply. A debtor's failure to file timely a plan can result in delays in the case and prejudice to creditors. The clerk or a party so directed by the court shall transmit a copy of the plan and any modifications thereof to the United States Trustee, unless the United States Trustee requests not to be served. FRBP 3015(d), (e).

The debtor must commence plan payments within thirty days after the plan is filed. Section 1326(a). The standing trustee is to retain such payments until confirmation, unless otherwise ordered by the court. Section 1326(a)(2). If the plan is confirmed, the standing trustee must distribute payments in accordance with the plan as soon as practicable. Before or at the time of each payment under the plan, the standing trustee shall pay any unpaid § 507(a)(1) claim and the trustee's percentage fee. Section 1326(b). If the case is dismissed or converted pre-confirmation, the standing trustee shall return any funds on hand to the debtor, after deducting § 503(b) claims to the extent allowed by court order. If the case is dismissed or converted postconfirmation, the standing trustee should distribute any funds on hand in accordance with controlling law of the jurisdiction. Courts are divided on the issue of the disposition of funds if the case is converted to chapter 7. The standing trustee should follow legal authority in the jurisdiction, or seek a court order regarding disposition of the funds.

### **B. CONTENTS OF A PLAN**

1. Section 1322(a) sets forth mandatory elements of a plan. The plan shall:
  - a. provide future earnings or income to the standing trustee sufficient for the execution of the plan;
  - b. provide for 100% payment, in deferred cash payments, of all § 507 priority claims, unless the creditor agrees to a different treatment; and
  - c. provide the same treatment for each claim within a class.

2. Section 1322(b) allows for the following permissive provisions in a plan. The plan may:
  - a. designate classes of unsecured claims as provided in § 1122;
  - b. modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
  - c. provide for the curing or waiving of any default;
  - d. provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim. A plan may provide that general unsecured claims be paid at the same time that secured claims, priority claims, other unsecured claims or administrative expenses are paid;
  - e. provide for the curing of a default and maintenance of payments on any claim on which the last payment is due after the date on which the final payment under the plan is due;
  - f. provide for the payment of postpetition claims;
  - g. provide for the assumption, rejection, or assignment of any executory contract or unexpired lease;
  - h. provide for the payment of a claim from property of the estate or property of the debtor;
  - i. provide for the vesting of the property of the estate in the debtor or in any other entity; and
  - j. include any other appropriate provision not inconsistent with the Code.

Under § 1322(d), the plan may not provide for payments over a period that is longer than three years unless the court, for cause, approves a longer period, which may not exceed five years. The standing trustee may have reason to object to a three year plan, e.g., where the standing trustee believes that the plan will not be feasible or meet the best interest of creditors test unless the term is extended beyond three years. On the other hand, the standing trustee should object to plans or modified plans projected to exceed the five year

period. The standing trustee should be aware of controlling law which determines the date at which the term of the plan begins to run.

Section 1322(e), which was added by the Bankruptcy Reform Act of 1994, provides that the amount necessary to cure a default shall be determined in accordance with the underlying agreement between the parties and applicable nonbankruptcy law.

### **C. CONFIRMATION OF A PLAN**

Section 1302(b)(2)(B) provides that the standing trustee shall appear and be heard at any hearing concerning confirmation of a plan. The standing trustee is responsible for tracking the scheduling of confirmation hearings and adjourned hearings so that confirmation is not unreasonably delayed.

The standing trustee may object to confirmation of the plan. § 1324.

The requirements for confirmation of a plan are set forth in § 1325(a). Unless a disposable income objection is pending, the court shall confirm a plan if:

- the plan complies with the provisions of chapter 13 and title 11;
- fees, charges, or amounts required under chapter 123 of title 28, or by the plan, have been paid;
- the plan has been proposed in good faith;
- unsecured creditors would receive not less than they would receive in a chapter 7 case ("liquidation analysis");
- each allowed secured claim holder has accepted the plan, the holder retains its lien and the holder receives the allowed amount of the claim, or the debtor surrenders the property to the holder;
- the debtor will be able to make all the payments under the plan and comply with the plan ("feasibility analysis").

#### **1. Best Interests of Creditors Test (Liquidation Analysis)**

Section 1325(a)(4) provides that the court may only confirm a plan if the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such

claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

The standing trustee should conduct a liquidation analysis of real and personal property prior to confirmation or modification of a plan. Liquidation value is determined by subtracting allowed exemptions and claims secured by the debtor's property, along with expenses allowed under § 506 of the Code, from the value of the debtor's property. Depending upon controlling law, hypothetical costs of sale and capital gains tax may also be deducted.

Section 541 defines property of the estate generally as all legal and equitable interests of the debtor. If appropriate, the standing trustee should include potential preferential or fraudulent transfer recoveries as part of the value of the estate. Denial of improper claims of exemption and invalid or unperfected liens should be considered. In valuing real and personal property, the standing trustee should be guided by controlling law. Since the value of any distribution under chapter 13, "as of the effective date of the plan," must be not less than the value of a distribution if the case were converted to chapter 7, plan payments to unsecured creditors must equal or exceed the chapter 7 liquidation value.

## **2. Feasibility Test**

The court is required to determine that the debtor will be able to make all payments under the plan and to comply with the plan. Section 1325(a)(6). The standing trustee must conduct a feasibility review prior to confirmation of a plan, after the claims bar date and prior to modification of a plan. The debtor must have sufficient income after expenses to make all required payments under the plan.

Under appropriate circumstances, a sale of estate property may be consistent with the § 1303 powers of the debtor and could be proposed as part of a plan under § 1322(b)(10). Plans may include "any appropriate provision." The standing trustee should determine any applicable local rules and law of the jurisdiction pertaining to sales of property by a standing trustee. The standing trustee must determine, if the sale is consistent with the terms of a plan and should review the settlement sheet to determine whether the creditors that are paid would otherwise be paid by standing trustee in the amounts on the settlement sheet.

Where a major portion of a plan's funding depends on uncertain or delayed liquidation of an asset such as future litigation recovery or sale of property, a number of courts have held that such plans are illusory or speculative and therefore unfeasible. The

standing trustee should carefully review the plans and consider whether an objection to the plan should be filed in the foregoing circumstances.

### **3. Disposable Income Test**

Section 1325(b) requires the debtor to commit all projected disposable income to the plan if the standing trustee or the holder of an allowed unsecured claim objects to confirmation of the plan. Consequently, a standing trustee should conduct a disposable income test for all plans and modifications, except those cases in which the debtor proposes to pay all allowed claims in full. If the debtor does not commit all disposable income, the standing trustee should file a § 1325(b)(1) objection to the plan.

"Disposable income" is defined in § 1325(b)(2). For an individual debtor, the term means income which is not reasonably necessary for maintenance or support of the debtor or a dependent of the debtor. For a debtor engaged in business, "disposable income" means income less the payment of expenditures necessary for the continuation, preservation, and operation of the business.

Income from sources that would be exempt in a chapter 7 case may be income for purposes of defining disposable income. Various courts have held that the following income should be included in a disposable income analysis: social security benefits, disability benefits, proceeds from sale of homestead (or, at least that amount in excess of the homestead exemption), alimony or child support, workers' compensation benefits, unemployment benefits, retirement benefits, life insurance or annuity benefits, proceeds from judgments or settlements, VA benefits, and any other source of income including tax refunds. Courts have denied expenses which are not reasonable or necessary, including monthly payments toward luxury items (cigarettes, expensive cars, motorcycles, motor homes, boats), dependent's college expenses, monthly premiums for life insurance, support of persons unrelated to the debtor, pension contributions. The debtor may subtract from disposable income certain contributions to religious or charitable institutions. Section 1325(b)(2)(A). The total household income and expenses are to be considered by the standing trustee in analyzing disposable income.

The standing trustee should object to any plan which proposes to pay unsecured creditors a percentage of their claims, rather than commit all projected disposable income to the standing trustee for payment of unsecured claims. For example, in a case where unsecured creditors file proofs of claim which total less than the scheduled amount of those claims, a percentage plan will likely not result in payment of all disposable income. Consider a hypothetical case where the debtor schedules \$10,000 of unsecured claims, but allowed claims are filed in the amount of only \$5,000. If the debtor projected disposable income sufficient to pay \$7,000 towards the scheduled

unsecured claims, the debtor should commit \$7,000 to the plan. If the debtor, however, committed only to paying 70% of the claims, creditors would receive only \$3,500 (70% of the filed claims in the amount of \$5,000). The standing trustee should object unless all projected disposable income is paid into the plan.

## **D. DISBURSEMENTS**

Section 1326(a)(2) states that "[i]f a plan is confirmed, the standing trustee shall distribute any such payment in accordance with the plan as soon as practicable." See also FRBP 3021. The standing trustee should put in place procedures designed to assure that disbursements to creditors are made soon after confirmation and to monitor the progress of cases to assure that cases move forward.

## **E. WAGE ORDERS**

A debtor is more likely to successfully complete plans if plan payments to the standing trustee are made through voluntary wage orders. The standing trustee should encourage voluntary wage orders in all cases where appropriate. If necessary, the cooperation of debtor's counsel should be sought in encouraging voluntary wage orders. The standing trustee should seek a voluntary wage order in any case in which the debtor fails to make any of the scheduled payments on time as a condition for not filing a motion to dismiss or withdrawal of a pending motion to dismiss.

## **F. AVOIDANCE POWERS**

A fundamental goal of the Code is to insure equality of distribution among creditors of the same class. The standing trustee possesses various powers in §§ 544 through 553 to avoid unequal treatment among creditors of the same class or other parties in interest. The standing trustee should be familiar with these sections.

The standing trustee should pursue avoidance actions in appropriate cases. Courts are divided as to whether the debtor has authority to file avoidance actions. In any event, the debtor may have, for example, made transfers to relatives or friends and have no incentive to pursue a preference or fraudulent transfer action. As an alternative to a formal recovery action, the standing trustee may reach an agreement with the debtor and debtor's counsel to "cash out" the transfer, by which the debtor agrees that the value of the transfer will be factored into the liquidation analysis and the disposable income test. If the standing trustee "cashes out" such a transfer, the standing trustee should obtain a written agreement from the debtor and transferee/creditor to toll, if possible, the statute of limitations relating to any applicable transfer recovery or lien avoidance action. If the case is subsequently converted, the tolling agreement may preserve the rights and powers of a successor standing trustee to proceed with an avoidance action. § 546(a).

Generally, any action brought by the standing trustee to recover money or property pursuant to an avoiding power is brought as an adversary proceeding and governed by FRBP 7001. The standing trustee does not need court approval to pursue such an action. FRBP 6009.

If it is necessary for the standing trustee to employ counsel to pursue avoidance actions, employment should be pursuant to § 327.

### **1. General Powers of The Standing Trustee**

Section 544 vests the standing trustee with the powers of a hypothetical judicial lien creditor or bona fide purchaser of real property under state law. The effect is to empower the standing trustee to avoid unperfected and unrecorded liens. This section also allows a standing trustee to exercise the rights of actual unsecured creditors to avoid liens under state fraudulent and preferential conveyance laws, to avoid defective bulk transfers, and to employ state equitable remedies such as the marshaling of assets.

### **2. Statutory Lien Avoidance**

Section 545 empowers the standing trustee to avoid certain statutory liens, such as landlord liens, in the debtor's property within the terms and conditions set out in the section. Note that "statutory lien" is defined in § 101(53).

### **3. Limitations on Avoidance Powers**

Section 546 places limitations on the standing trustee's avoidance powers. Limits are specified as:

- a. statute of limitations, which is the later of two years after the entry of the order for relief or one year after the appointment or election of the first standing trustee, or the time the case is closed or dismissed, whichever occurs first;
- b. post-petition perfection authorized by non-bankruptcy law;
- c. reclamation pursuant to statutory or common law;
- d. producers of grain or fishermen; and
- e. payments regarding settlement or margin accounts, repurchase agreements or swap agreements.

### **4. Preferences**

Section 547 deals with preferential transfers. It is probably the most important and most frequently used avoiding power of the standing trustee. The standing trustee may avoid any transfer of an interest of the debtor in property:

- a. to or for the benefit of a creditor;
- b. for or on account of an antecedent debt owed by the debtor before the transfer was made;
- c. made while the debtor was insolvent;
- d. made on or within 90 days of the date the petition was filed; and
- e. which enables the creditor to receive more than the creditor would have received if the case was a case under chapter 7 and the transfer had not been made.

All five of the conditions must be present to avoid the transfer. The 90 day time period found in (d) is extended to one year if the transfer is to an "insider" as defined in §101 (31). The transfer in question can be the granting or perfection of a lien or security interest as to property of the debtor.

The standing trustee should become familiar with the provisions of § 547(c) which define transfers that the standing trustee cannot avoid. A transferee will most likely raise a provision of this subsection as a defense to an avoidance action brought by the standing trustee.

## **5. Fraudulent Transfers**

Section 548 allows the standing trustee to avoid certain transfers that were made with the actual intent to hinder, delay, or defraud creditors, or in which the debtor received less than reasonably equivalent value in exchange for the transfer. While preferential transfers are most often made to creditors, fraudulent transfers are most frequently made to family or friends.

The standing trustee should be aware of state fraudulent conveyance laws which may allow avoidance of transfers beyond the one year period.

## **6. Post-Petition Transfers**

Section 549 recognizes the standing trustee's right to avoid any transfer of property made after the commencement of the case that is not specifically authorized by the Code, by the court or by the plan.

## **7. Setoff**

Section 553 recognizes the right to offset mutual, pre-petition, allowed claims and takes such transactions out of the preference category. The section places limits on the right of the offset as to claims to which the creditor became entitled to within 90 days of the filing of the petition.

## **G. CLAIMS**

An unsecured creditor must file a proof of claim by the claims bar date to be eligible to receive payment. FRBP 3002(a). The standing trustee should not make payment under a plan to an unsecured creditor not filing a timely proof of claim. Courts are divided as to whether secured claims are required to be filed. The bar date in a chapter 13 case is 90 days after the first date set for the meeting of creditors. FRBP 3002(c). There are several exceptions to the 90 day rule. A governmental unit, for example, may timely file a claim 180 days after the date of the order for relief. If the creditor does not timely file a proof of claim, a co-debtor, or the debtor or standing trustee may file a claim within 30 days after the expiration of the bar date. Sections 501(b) and (c); FRBP 3004. The standing trustee would generally not have independent information regarding a creditor's claim against the debtor and, under most circumstances, should not file claims on behalf of creditors. However, the standing trustee may generally provide notice regarding claims that will alert debtors to consider filing claims for non-filing creditors.

### **1. Classification of Claims**

Section 1322(b)(1) allows debtors to designate classes of unsecured claims as provided in § 1122, so long as the plan does not discriminate unfairly against any class. A plan may place a claim in a class only if the claim is substantially similar to the other claims in the class. Section 1122(a). The debtor may designate a separate class of small unsecured claims for administrative convenience. Section 1122(b). Priority claims must be paid in full unless the creditor agrees to a different treatment. Section 1322(a)(2). Therefore, separate classifications of priority claims are permissible. A plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims. Section 1322(b)(1).

Other attempts to separately classify unsecured claims may be more problematic. A typical problem is where the debtor separately classifies unsecured debt which is nondischargeable, e.g., certain student loans or traffic fines, in order to prefer that debt to dischargeable debt. Courts are divided on the issue of whether the debtor may separately classify nondischargeable claims. Unlike chapter 7, chapter 13 does not

require that unsecured creditors be paid pro rata, only that the plan not "discriminate unfairly" against any class. Section 1322(b)(1).

## **2. Review of Claims**

Claims are deemed allowed as filed unless a party in interest files an objection to the claim. Section 502(a). Sections 1302(b)(1) and 704(5) require the standing trustee to examine proofs of claims and object to the allowance of any claim that is improper if a purpose would be served. In chapter 13, it is always incumbent upon a standing trustee to review proofs of claim, particularly secured claims and priority claims. Even if secured claims are not required to be filed, the standing trustee should review the security documents to ensure that a claim is secured before paying such claim as a secured claim in the plan. The standing trustee must ensure that such claims are proper with respect to timeliness of filing, dollar amount and supporting documentation. The standing trustee must also review, and if appropriate, object to unsecured claims if the plan proposes a distribution to nonpriority unsecured creditors. The standing trustee should review the actual proofs of claims and make an independent determination of classification and amount of the claim. The claims review process should not necessarily be delayed until the expiration of the bar date for filing claims. It may be necessary to review claims of creditors seeking adequate protection payments. Claims review may also be necessary when reviewing plan feasibility or prior to making payments under the plan.

Some of the issues a standing trustee should consider when reviewing claims are:

- a. If a claim is filed as secured, there should be appropriate supporting documentation, e.g., a properly recorded UCC financing statement. The standing trustee should review this documentation to determine whether the secured creditor's lien is subject to avoidance pursuant to § 544. Secured creditors may also be required to provide supporting documentation or explanation for attorney's fees and other costs added to their claims. Section 1302(b)(2)(A) requires that the standing trustee appear and be heard at any hearing that concerns the value of property, subject to a lien. In some circumstances, the standing trustee can consider ensuring proper treatment of unsecured claims by limiting secured claims (except a claim secured only by a security interest in real property that is the debtor's principal residence) to the value of the debtor's collateral;
- b. If a claim is filed as secured by reason of a judgment, the standing trustee should verify that the judgment was properly recorded at least 90 days prior to the filing. Such a judgment may be accorded secured status;

- c. Tax claims should be verified. In many instances, a taxing entity will file only one claim which may include liens as well as priority and general unsecured taxes. Treatment of interest and penalties which have accrued pre-petition and post-petition on tax claims depends on the classification of the claim;
- d. The standing trustee should review unsecured claims for appropriate documentation, accuracy and timeliness;
- e. The standing trustee should review schedules and compare judgments and liens listed in the schedules to claims that are filed;
- f. The standing trustee should ensure that the proper interest rate, if applicable, is paid on claims. The standing trustee should be familiar with the court allowed pre-confirmation and post-confirmation rates of interest for oversecured claims. Interest is allowed on undersecured claims up until the date of the petition when the principal balance is fixed. After the filing of the petition, interest is not allowed on unsecured claims or the undersecured portion of claims unless the liquidation analysis shows a solvent debtor who may be required to pay postpetition interest, or if co-debtor payments under § 1322(b)(1) require interest. Another exception to the bar on payment of interest on the undersecured portion of claims is found in § 1322(b)(2) which permits the plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. Such claims must be treated as fully secured. Post-petition interest may also continue to accrue on nonpriority nondischargeable claims such as student loans. The standing trustee may consider the appropriate rate of any interest which accrues on post-petition missed, late or partial secured payments; and
- g. The standing trustee should object to duplicate claims.

### **3. Subordination of Claims**

Section 510 empowers the standing trustee to obtain a court order subordinating certain claims to other claims for purposes of distribution. Subordination may be based upon an agreement, or upon principles of equitable subordination. Generally, equitable subordination requires misconduct on the part of the creditor that has injured the debtor or conferred an unfair advantage to the creditor.

#### **4. Post-Petition Claims**

A claim may be filed by an entity with a post-petition tax or consumer claim. Section 1305(a). Unless the plan provides otherwise, such a claim, if filed and allowed, is treated as a pre-petition unsecured claim. Section 1305(b). The standing trustee should not pay a post-petition claim unless the holder has filed a claim. Because the holder of a post-petition claim is not a creditor as defined in § 101(10), § 501(c) and FRBP 3004 are not applicable to post-petition claims and neither the debtor nor standing trustee may file a claim on behalf of the holder of such a claim. If the holder chooses not to file a proof of claim, the claim is not discharged at the conclusion of the debtor's plan.

Unless the plan provides otherwise, a post-petition claim for a consumer debt shall be disallowed if the holder of the claim knew or should have known that prior approval by the standing trustee was practicable and was not obtained. § 1305(c) and § 1322(b)(6). This rule applies only to consumer debt, not to post-petition taxes. A typical example of a justification of a post-petition consumer debt is the debtor's need to buy a car for transportation to work. Debt service on a post-petition claim may render the debtor's plan unfeasible and may require the debtor to modify the plan.

#### **H. FINAL REPORT**

Section 704(9), through reference in § 1302(b)(1), requires a standing trustee to make a final report and file a final account of the administration of the estate. The standing trustee should have procedures in place for the review of each case prior to filing the final report to ensure that the case has been administered properly and all claims have been paid according to the plan. If possible, this review should not be conducted by the same staff member that monitored the file during the course of the case.

Although the debtor may receive a discharge upon completion of the debtor's obligations under the plan, a final report cannot be filed on a case until all checks relating to the case have cleared the bank. However, the discharge may be granted to the debtor prior to that time. Section 347(a) provides that ninety (90) days after the final distribution the standing trustee shall stop payment on any check remaining unpaid, and any remaining funds be paid into the court.

Although not required by the Bankruptcy Code, a copy of the final report should, at a minimum, be served on the debtor, the debtor's attorney, and the United States Trustee, unless the United States Trustee has requested otherwise. The standing trustee may serve all creditors as an additional internal control measure.

## **I. DISCHARGE**

### **1. General**

The discharge granted in a chapter 13 case is very broad and even discharges certain claims that would be nondischargeable in a chapter 7 proceeding. Among the claims that may be discharged in chapter 13 are claims for fraud, breach of fiduciary duty, and intentional and malicious injury.

Family support claims (alimony, maintenance and child support) and student loan claims are excepted from discharge both in chapter 7 and chapter 13. Other debts which are not dischargeable are described in § 523(a) and § 1322(b)(5). See § 1328(c).

In chapter 13 cases, confirmation of a plan does not immediately result in a discharge of debts. In general, claims are discharged if they are "provided for by the plan or disallowed under § 502," and if the debtor completes all payments under the plan. § 1328(a). In order for a full discharge to be effected, the plan should provide for claims for which a proof of claim is never filed. In general, a plan may specifically provide for no payment on a particular claim, and the claim may nevertheless be discharged, as long as the creditor had notice of the plan.

### **2. Hardship Discharge**

11 U.S.C. § 1328(b) provides for a hardship discharge at any time after the confirmation of the plan and after notice and a hearing, to a debtor that has not completed payments under the plan only if:

- a. the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- b. the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- c. modification of the plan under § 1329 is not practicable.

The standing trustee should review motions under § 1328(b) and object to the debtor's discharge if advisable. § 1302(b)(1); § 704(6).

A discharge granted before completion of all plan payments is narrower in scope than the discharge granted if all payments are made. Under § 1328(c), a hardship discharge relieves the debtor of only unsecured debts and does not discharge debts described in any of the sections of § 523 (a). Moreover, long term debts, which often include arrears on mortgage payments, are not discharged.

### **3. Post-Petition Debts**

A post-petition debt may be excepted from discharge under § 1328(d), which provides that "a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under § 1305(a)(2) of this title if prior approval by the standing trustee of the debtor's incurring such debt was practicable and was not obtained."

## **CHAPTER 7**

# **MOTIONS TO DISMISS OR CONVERT**

## **CHAPTER 7 - MOTIONS TO DISMISS OR CONVERT**

The Code grants the debtor certain rights concerning dismissal or conversion of the case. The debtor has the right to convert a chapter 13 case to chapter 7 at any time. § 1307(a). If the case was not previously converted to chapter 13 from chapter 7, 11 or 12, the court, upon the debtor's request, shall dismiss the chapter 13 case. § 1307(b). On the other hand, if the case were previously converted from another chapter to chapter 13, the debtor must file a motion for dismissal and the standing trustee and other parties in interest are given an opportunity to be heard on the motion. The standing trustee or a creditor may object to dismissal and ask that the case be converted to chapter 7 so that a panel trustee could liquidate unencumbered non-exempt assets of the estate for the benefit of creditors.

The standing trustee is responsible for seeking dismissal or conversion of cases in which the debtor is delinquent in payments. The standing trustee should have in place controls to ensure that prompt action is taken regarding these delinquencies. Early and accurate identification of problem cases and prompt action by the standing trustee is essential.

## **CHAPTER 8**

# **CHAPTER 13 DEBTORS ENGAGED IN BUSINESS**

## **CHAPTER 8 - CHAPTER 13 DEBTORS ENGAGED IN BUSINESS**

### **A. INTRODUCTION**

Chapter 13 business cases may present many complex issues. Examples include the incurrence of post-petition trade debt; business tax issues; use of leased premises for the operation of the debtor's business; concerns about potential liability claims; and questions involving ongoing liabilities to employees. There is also a wide range of business sophistication among chapter 13 business debtors and the debtor's level of business acumen can cause concern regarding the source of funds for plan payments. Often the debtor needs business budgeting, management, and accounting counseling to address needs of the business.

### **B. IDENTIFYING THE CHAPTER 13 BUSINESS CASE**

The effectiveness of the standing trustee's treatment of the business case is dependent upon the standing trustee's ability to make early identification of the potential business case. The employee responsible for the first level of "new case" review in the standing trustee's office should be trained to identify the characteristics of potential business cases. The Code defines a chapter 13 debtor engaged in business, at § 1304(a), as "[a] debtor that is self-employed and incurs trade credit in the production of income from such employment..." However, it is often not possible to determine from the petition and schedules whether a case fits within that definition. Further, a business debtor may incur trade credit after filing. Therefore, the standing trustee should identify a list of objective criteria to aid the employee reviewing the cases to determine which cases merit further consideration as business cases by the standing trustee.

Some factors which may indicate that a chapter 13 debtor engaged in business is a business case include, the following:

- the use of "dba" in the style of the case;
- designation on the petition as a business;
- debtor is self-employed;
- debtor is incurring trade credit in the production of income;
- debtor has one or more employees;
- debtor generates business income;
- the existence of inventory for manufacture and/or resale;
- the existence of trade debt;
- ownership and/or lease of business property;
- ownership of rental property;
- ownership and/or lease of office equipment, furnishings, and supplies;

- obligations for payroll taxes, business tax, real estate tax and personalty tax;
- obligation for business insurance;
- schedules "I" and "J" include business income and expenses; and
- business expenses deducted from income to determine "disposable income."

At a minimum a debtor with employees; a debtor requiring significant post-petition unsecured debt; or a debtor in a business requiring a license and/or liability insurance to protect the public, should be subject to increased monitoring to assure that employees will be paid, that taxes will be withheld in appropriate amounts, and that liability, worker's compensation and other insurance requirements will be met, as well as any state licensing requirements.

When the standing trustee's analysis indicates that a chapter 13 case filing may be a business case, the standing trustee should inquire further to determine whether the debtor is actually engaged in business. Some standing trustees conduct this inquiry at a meeting prior to the § 341(a) meeting; others request that the debtor bring documents such as tax returns, financial statements and the like to the § 341(a) meeting and examine the debtor there. Appendix E contains sample business examination checklists.

## **C. DUTIES OF A STANDING TRUSTEE IN A BUSINESS CASE**

### **1. Applicable Code Sections**

If the debtor is engaged in business, the standing trustee must perform certain duties in addition to those performed in a non-business case. Specifically, § 1302(c) of the Code requires that "[If the debtor is engaged in business, then ... the standing trustee shall perform the duties specified in §§ 1106(a)(3) and 1106(a)(4)...]" Section 1106(a)(3) requires that the standing trustee, "except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formation of a plan..." Pursuant to § 1106(a)(4), the standing trustee is required "[a]s soon as practicable to file a statement of any investigation conducted..., including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate..."

### **2. Standing Trustee's Investigation of a Debtor Engaged in Business**

The standing trustee's investigation of a debtor engaged in business will vary depending upon the nature and size of the business.

It is advisable for the standing trustee to meet with the debtor and with debtor's counsel, if the debtor is represented, prior to the meeting of creditors or to request that specific documents be brought to the § 341(a) meeting for examination and review. The standing trustee should send a letter instructing the debtor to provide the standing trustee with tax returns, financial statements and such other books and records of the business as the standing trustee requires. The debtor should be directed to bring documents reflecting the financial situation of the debtor's business including the following:

- a. copies of federal and state tax returns, along with all supporting schedules, for at least the two years preceding the filing;
- b. copies of financial statements furnished to a third party such as a trade creditor or a bank within the two years preceding the filing of the petition, including, but not limited to the balance sheet, income statement and cash flow statement;
- c. current books and records of the business, including checks and check registers;
- d. monthly profit and loss statements for at least the year preceding the filing;
- e. current schedule of accounts receivable and accounts payable;
- f. current insurance policies.

The standing trustee should advise the debtor of the debtor's duty to keep records, make reports and give notice of the case under FRBP 2015.

### **3. Cost of Investigation and Retention of Professionals**

The standing trustee should ordinarily conduct the initial investigation and gather the relevant books and records. An outside professional should not be routinely employed. If a more extensive investigation appears warranted, the standing trustee may seek approval to hire an outside business examiner pursuant to §327(a). In that case, the standing trustee would first seek compensation for the professional's services to be paid as an administrative claim in the bankruptcy case. If the case lacks funds, the standing trustee may seek to compensate the professional from the expense fund if pre-approved by the United States Trustee.

#### **4. Contents and Filing of the Investigative Statement or Summary**

As soon as practicable, the standing trustee shall file with the court, and serve upon the United States Trustee, a statement of the investigation. At a minimum, the following list of items should be addressed in the investigative statement:

- a. nature and location of business;
- b. number of employees;
- c. status of tax returns and tax delinquencies (federal, state, local, employer, property taxes, etc.);
- d. insurance;
- e. business licenses;
- f. condition of books and records;
- g. summary of profit/loss statements;
- h. aging of account receivables and payables;
- i. debts;
- j. work-in-progress;
- k. turnover actions, if applicable;
- l. any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate; and
- m. except to the extent the court orders otherwise, a statement concerning the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.

Sample statements of business investigations are in Appendix F. If the investigation uncovers evidence of fraud, the standing trustee should take appropriate action.

#### **5. Periodic Monitoring**

Following the investigation and report, the standing trustee can quantify the need for continued monitoring of the debtor. The level of monitoring is dependent upon the nature of the case and the business expertise of the debtor. Monitoring might include the debtor meeting with the business case analyst to review the budget, an evaluation of the debtor's accounting systems, an on-site tour (or periodic on-site tours) of the business premises, the requirement that periodic operating reports be filed along with bank statements and tax deposits and payment forms and close monitoring of insurance coverages. The standing trustee should monitor the case to ensure that the ongoing

business, while in bankruptcy, is not in deeper financial difficulty than at the time of the filing of the case.

#### **D. RIGHTS AND POWERS OF A CHAPTER 13 DEBTOR ENGAGED IN BUSINESS**

A debtor engaged in business has special powers and rights pursuant to § 1304(b). Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor.

A debtor engaged in business has the rights and powers of a trustee, subject to such limitations or conditions as the court prescribes, under §§ 363(c) and 364 of the Code and subject to any limitations on a trustee under those sections. Thus, subject to these limitations, a debtor engaged in business may use, sell or lease property of the estate, in the ordinary course of business, without notice or a hearing, and may use, sell or lease property of the estate out of the ordinary course of business with court approval. A debtor engaged in business may incur business debt. The debtor engaged in business has the rights and powers granted to all debtors in § 1303. The debtor engaged in business is also entitled to deduct reasonable and necessary business expenses in arriving at "disposable income." The standing trustee should review both the debtor's business and personal budgets when considering disposable income.

#### **E. DUTIES OF A CHAPTER 13 DEBTOR ENGAGED IN BUSINESS**

A chapter 13 debtor who is engaged in business is subject to specific requirements not applicable to the non-business chapter 13 debtor.

##### **1. Applicable Code Sections**

Section 1304(c) requires that "[a] debtor engaged in business ... perform the duties of the trustee specified in § 704(8) of this title." Section 704(8) requires the debtor engaged in business to "...file with the court, with the United States Trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States Trustee or the court requires...." This duty is amplified in FRBP 2015 (c) which directs the debtor to keep a record of receipts and the disposition of money and property received; file the reports and summaries required by § 704(8), including a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and on behalf of employees and the place where these amounts are deposited; to comply with the noticing

provisions of FRBP 2015(a)(4); and, if the court directs, file and transmit to the United States Trustee a complete inventory of the property of the debtor within the time fixed by the court.

## **2. Periodic Reports and Summaries of the Operation of the Business**

The standing trustee should instruct the debtor and inform debtor's counsel, if any, to file periodic operating reports and to attach a copy of the monthly bank statements from its bank, credit union, savings or other financial institution. The periodic reports should be reviewed by the standing trustee to ensure, at a minimum, that the debtor is complying with governmental requirements such as the tax laws and that the debtor is meeting applicable legal obligations required of an employer (e.g., licensing, insurance, workers' compensation). Many standing trustees have devised operating report forms. Sample operating report forms are attached in Appendix E.

### **F. EVALUATING ATTORNEY FEES IN A CHAPTER 13 BUSINESS CASE**

The fact that the standing trustee identifies a particular case as a business case does not automatically justify a significant increase in the debtor's attorney's fees. Many variables must be considered when analyzing a fee request. Attorneys routinely provide services to business debtors that are in addition to the services provided to the average consumer debtor. In many cases with joint chapter 13 debtors, one spouse is self-employed while the other spouse has outside employment. In these cases the debtor's attorney not only has to establish a household budget, but also a business budget. The complexity of the issues involved in the case is a significant factor. A debtor's attorney who deals with the Internal Revenue Service in securing an agreement in a tax issue, works out a payment plan with a secured lender or renegotiates business lease with a landlord, is likely to justify a higher attorney fee than that ordinarily allowed in a routine chapter 13 case. The reasonableness of the debtor's attorney fees should be evaluated by the standing trustee and an objection filed when the trustee determines the fees exceed the value of service provided.

## **CHAPTER 9**

# **FINANCIAL AND OPERATIONAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS**

## **CHAPTER 9 - FINANCIAL AND OPERATIONAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS**

### **A. DEPOSIT AND INVESTMENT OF FUNDS**

The deposit and investment of funds are governed by § 345. The standing trustee shall maintain bank or investment accounts which will yield the maximum reasonable net return, taking into account the safety of such deposit or investment. A standing trustee must use a banking institution for the deposit of receipts. The banking institution must be federally insured by the Federal Deposit Insurance Corporation (FDIC) and must otherwise comply with the requirements of the Bankruptcy Code and the United States Trustee. The standing trustee must notify the United States Trustee of the identity of each banking institution where funds are held.

When a standing trustee receives funds, the funds are to be deposited to the appropriate bank account immediately after receipt.

Under no circumstances may receipts from debtors be deposited to the standing trustee's business, personal, or law firm trust accounts or salary and expense account.

#### **1. Types of Accounts**

The standing trustee must maintain a pre-confirmation trust account, a post-confirmation trust account and an operating expense trust account. Other special accounts may be required or established with approval of the United States Trustee.

#### **2. Pre-Confirmation Trust Account**

This account is used to deposit funds received from debtors in chapter 13 cases prior to confirmation of the plan. Upon confirmation of the chapter 13 plan, the standing trustee will transfer the debtor's pre-confirmation payments to the post-confirmation trust account and any interest earned on the funds to the operating expense trust account. If the case is dismissed prior to confirmation, the standing trustee will refund the payments and any interest earned to the debtor after deducting any § 503(b) awards ordered by the court.

The United States Trustee may authorize the standing trustee to maintain pre-confirmation deposits in interest bearing accounts only after determining that the standing trustee maintains a system able to compute accurately the amount of interest earned and issue Internal Revenue Service Form 1099. If interest of \$10 or more is earned on the deposit prior to conversion or dismissal, the standing trustee must prepare and mail

Form 1099 to the Internal Revenue Service and to the debtor. The United States Trustee may provide written authorization to a standing trustee to maintain a pre-confirmation trust account as a separate account within the post-confirmation account if the United States Trustee has determined that the standing trustee's accounts reflect the pre-confirmation deposits separately, credit the interest earned to the appropriate deposit, prevent the transfer of accrued interest to the expense trust account before the plan is confirmed and that, in the event the case is dismissed prior to confirmation, the standing trustee will be able to compute and pay over to the debtor the exact amount of interest earned and issue a Form 1099, whenever required.

### **3. Post-Confirmation Trust Account**

This account is used to deposit funds received from debtors for cases with confirmed plans and to make payments according to plans. All funds received prior to plan confirmation are to be transferred to this account as soon as the order of confirmation has been entered. This account is to be used to make disbursements of the percentage fee to the operating expense trust account. Interest earned by this account is transferred to the operating expense trust account at least monthly. The standing trustee's accounting records must reflect all transactions of this account, including receipts, disbursements and interest earned.

### **4. Operating Expense Trust Account**

This account is used to deposit all percentage fee income from the post confirmation trust account, interest income, court ordered § 503(b) awards and any other receipts not allocable to a specific case. Under no circumstances should the standing trustee deposit chapter 13 derived income into any account other than the operating expense trust account. The account must be interest-bearing, unless otherwise approved by the United States Trustee.

The operating expense trust account is used to pay all actual and necessary expenses approved by the United States Trustee, standing trustee's compensation/benefits and payments to the United States Trustee System Fund under 28 U. S.C. § 586(e)(2). Expenses for other purposes or for any portion of general office expenses unrelated to the administration of the standing trustee's chapter 13 cases may not be paid out of the operating expense account.

### **5. Special Investment Accounts**

The standing trustee is to invest funds not needed for immediate disbursements in interest bearing accounts or certificates of deposit of financial institutions insured by the

FDIC. Upon approval of the United States Trustee, the standing trustee may invest in obligations of the United States Treasury (U.S. Treasury Bills, Bonds or Notes). The standing trustee is not to invest in repurchase agreements (repo's) or reverse repo's as they are not insured by the FDIC; or in non-bank money market accounts or commercial paper. The standing trustee is not to make any investments that would delay disbursements under confirmed plans in violation of the standing trustee's duty to make timely payments to creditors.

## **6. Requirements Pertaining to Depositories**

The standing trustee may only use a depository that complies with the requirements of the Code and the policies of the United States Trustee. The United States Trustee can provide the standing trustee with a list of depositories that meet the requirements. A depository requesting to be added to the list should contact the United States Trustee for the specific requirements. The requirements include, but are not limited to, providing original canceled checks with the monthly bank statements, submitting monthly or quarterly bank balance reports to the United States Trustee, and certifying, in the form of an affidavit, that a standing trustee has not and will not receive favorable treatment inuring to the personal benefit of the standing trustee. Any depository in which the trustee maintains chapter 13 funds is to be directed by the standing trustee to provide the United States Trustee with an affidavit detailing any personal financial relationship with the standing trustee and, if such a relationship exists, a statement that the trustee does not receive any preferential treatment. The depository must agree to provide the United States Trustee bank records upon request. If a depository fails to comply with the requirements of the United States Trustee, the standing trustee should promptly notify the United States Trustee and arrange to move the funds to another depository.

## **7. Collateralization of the Standing Trustee's Deposits**

It is the responsibility of the standing trustee to ensure that the banking institution is in compliance with § 345 to the extent of the standing trustee's deposits. The standing trustee is to deposit trust funds immediately upon receipt in trust accounts in financial institutions insured by the FDIC and approved by the United States Trustee to receive such funds. Generally, financial institutions must collateralize all chapter 13 trust accounts on deposit by an individual trustee at a specific financial institution. These accounts include interest income, to the extent account balances exceed \$100,000. However, pursuant to 12 C.F.R. § 330.11 (d), with the approval of the United States Trustee, pass-through insurance coverage is available for individual debtor funds deposited in a commingled account consisting of funds received from numerous debtors, if the following two requirements are met: (1) the deposit account records of the insured depository must expressly and specifically disclose the existence of the

fiduciary relationship; and (2) the records maintained by or on behalf of the standing trustee must detail the extent of each debtor's interest in the commingled funds on deposit. 12 C.F.R. § 330.4 (b).

In order for the United States Trustee to authorize such an action, the United States Trustee must receive the following written assurances:

- a. The financial institution must provide written evidence that its deposit account records specifically disclose the existence of a fiduciary relationship. Words such as "trust account" or "trustee" must be used. To verify that account records continue to reflect the existence of a fiduciary relationship, the depository institution shall be required to provide an affidavit to the United States Trustee on an annual basis. This is to be included in the bank's annual affidavit regarding personal financial relationships with the standing trustee.
- b. The standing trustee must provide written evidence that he or she maintains records in the regular course of business which reflect the interest of each debtor in the commingled funds deposited to the trust account and that each of the respective interests is less than \$100,000. Although all funds for a particular debtor will ordinarily be maintained in one account and in a single financial institution, a standing trustee may occasionally hold debtor funds in multiple accounts or in a certificate of deposit. To ensure the \$100,000 insurance limit is not exceeded, the United States Trustee must also be able to ascertain from the standing trustee's records, the amount and location of all funds held on account for each estate, including funds deposited into separate trust accounts or certificates of deposit. While there is no prescribed way to accomplish this, it is preferable that the standing trustee provide a computer generated report which identifies each case and the amount held on account for the case, and demonstrates that the report has been reconciled with the last monthly bank statement(s).

If the United States Trustee authorizes collateral to be released, the United States Trustee must receive a follow-up report from the standing trustee annually, or more frequently as the United States Trustee deems reasonable and appropriate.

The financial institution may meet this requirement by depositing securities of the kind specified in 31 U.S.C. § 9303 in an amount greater than the excess over FDIC limits as determined by the United States Trustee. These securities must be pledged into the account of United States Trustee with the Federal Reserve Bank Branch serving the financial institution. In lieu of depositing securities with the Federal Reserve Bank, an institution may post a surety bond with the United States Trustee to cover any excess over \$100,000. Such bond and form must be approved by the United States Trustee.

The United States Trustee obtains summaries of the amounts on deposit from each bank being used by a standing trustee in order to assist in monitoring standing trustee accounts and bonding requirements. The United States Trustee also receives a report from the Federal Reserve to review the sufficiency of the collateral posted by the banking institutions. The standing trustee must assist the United States Trustee in obtaining bank statements or summaries of amounts on deposit. An authorization for the bank's release of information to the United States Trustee is required from the standing trustee.

## **B. FINANCIAL REPORTING AND RECORD KEEPING**

Section 704(2) places the duty on the standing trustee to be accountable for all property received. When considering the number of cases assigned to a standing trustee and the resulting number of transactions experienced in these cases, it is imperative that the standing trustee design, document and implement a comprehensive system of record keeping, financial reporting and internal controls. If necessary, the standing trustee should seek approval from the United States Trustee to employ a professional with competent experience in this field. Several examples of internal control procedures are discussed in this chapter. The standing trustee's records are to reflect the accurate results of operations.

### **1. Characteristics of Accounting Procedures**

- a. **Operating Responsibilities.** The accounting system should be designed to facilitate preparation of internal reports that will assist employees in the performance of their duties.
- b. **Current Records.** Records should be updated daily and reflect each day's activities separately from that of another day. The records should show the financial position as of a specific date.
- c. **Safeguarding of Accounting Records.** Accounting records should be stored in secure facilities. Accounting records must receive adequate protection to avoid a possibility of loss due to fire or other natural disaster.
- d. **Subsidiary Control Accounts.** Subsidiary records must be reconciled periodically with general ledger account balances.
- e. **Audit Trail.** The records and systems must be designed to allow the standing trustee or auditor to trace and verify transactions through the standing trustee's record keeping system, including electronic records.

## 2. Records to be Maintained by the Standing Trustee

- a. **General Ledger.** The general ledger contains a listing of all bookkeeping accounts maintained by the standing trustee. These accounts are necessary to prepare the chapter 13 budget and annual report, as well as to assist in managing other financial duties.

Automating the record keeping process will provide greater internal control and efficiency.

Appendix G contains a sample general ledger.

- b. **Cash Receipts Journal.** The cash receipts journal is used to record, in one journal, all receipts by the standing trustee. A cash receipts journal is required to be maintained as part of the accounting system.

See Appendix H for a sample cash receipts journal.

- c. **Cash Disbursements Journal.** All disbursements are to be made by check and are to be recorded in the cash disbursements journal.

See Appendix H for a sample cash disbursements journal.

- d. **Individual Case Cash Receipts and Disbursements Ledgers.** Individual receipts and disbursements need to be posted from the cash receipts and disbursements journals to each individual debtor ledger. There is automated software available to maintain the debtor ledgers.

- e. **Fixed Asset Register (Inventory).** The fixed asset register is a subsidiary account of all fixed assets owned by the trust operation. It should include all assets that exceed \$250 in value and have a useful life of at least one year. The account should list all increases and decreases to the fixed asset register. Upon disposition of assets, the standing trustee should delete items from the register and identify their disposition. For example, assets were applied toward the purchase of upgrades or assets were of no value and donated to a charity. The register should be provided to the United States Trustee annually. All assets should be listed with a serial number or an identification number.

## **C. ACCOUNTING REPORTS**

### **1. Final Reports**

A final report must be filed promptly for each chapter 13 case after final distribution and after all checks relating to the case have cleared the bank.

### **2. Periodic Debtor Reports**

Periodic debtor reports should be mailed by the standing trustee, at least annually, to the debtor and the debtor's attorney. The report will show all receipts from the debtor and disbursements made by the standing trustee during the reporting period. Additionally, the report must indicate the debtor's undistributed funds on hand. The standing trustee must maintain a copy of these reports or certify to the United States Trustee that the reports have been sent to the debtor.

See Appendix I for sample periodic debtor reports.

### **3. Monthly Reports**

Monthly reports are required to monitor actual expenses against approved budgeted expenses, monitor the amount of a standing trustee's bond, monitor disbursements to creditors, and monitor collateralization of funds pursuant to 11 U.S.C. § 345, as well as to determine any necessary adjustment to the standing trustee's percentage fee. The report to the United States Trustee must be sent within thirty (30) days after the end of the month unless otherwise stated by the United States Trustee.

See Appendix J for a sample monthly report.

### **4. Annual Reports**

The standing trustee must submit an Annual Report in the format prescribed by the Executive Office for United States Trustees for the period covering October 1 to September 30, or for the portion of the fiscal year during which the standing trustee serves. Annual reports are to be submitted to the United States Trustee no later than November 15 following the end of the fiscal year, or if the standing trustee does not serve through the end of the fiscal year, within 45 days from the end of the period in which the standing trustee served.

The report states the gross amount received by the standing trustee, the amounts disbursed under plans, the amounts disbursed to the operating expense trust account

for compensation and expenses, the amount of interest earned, the amounts returned to debtors, and the amount to be remitted to the United States Trustee for payment to the United States Trustee System Fund.

See Appendix K for the 1998 annual report form and instructions.

#### **D. SECURITY AND PERSONAL SAFETY CONSIDERATIONS**

Participants in the bankruptcy system run the unfortunate risk of becoming the target of threats, violence or other crimes. As a result, the standing trustee must take all reasonable measures to insure the safety and security of employees, debtors, creditors and other persons involved in Chapter 13 cases. Each office should prepare a written security plan that addresses such issues as emergency evacuation procedures and instructions to be followed in case of fire, bomb threat, severe weather conditions or other threatening conditions. Unauthorized access from public areas to secure areas of the office may be controlled by deadbolt locks, punch locks or similar devices. Visitors should not be cleared into secure areas of the office until the identity of the staff member that they wish to see and the purpose of their visit has been ascertained, and clearance from the staff member in question has been obtained. All staff members should be provided with the phone numbers necessary to contact police, fire and medical emergency personnel. All staff members also should know the location of the nearest fire alarm. If threats to disrupt § 341(a) meetings or other office functions have been received, or if such activity is anticipated, the standing trustee should immediately contact the United States Trustee to determine the best course of action, including seeking authority to employ a security guard to assist in maintaining order.

All security concerns should be taken seriously, and prudent countermeasures should be implemented in consultation with the United States Trustee. The United States Marshals Service, local police departments and other law enforcement agencies will frequently assist in providing a security threat assessment upon request.

#### **E. SPECIAL CONSIDERATIONS FOR COMPUTER SYSTEMS**

##### **1. Selection of a Computer Service Provider**

The standing trustee should automate the chapter 13 financial reporting, accounting, and case administration systems. There are numerous companies that offer computer systems capable of producing reporting forms and handling the other reporting requirements outlined in this Handbook.

The United States Trustee does not endorse or recommend any particular computer system or service provider.

If the service provider processes financial transactions on behalf of the trust, the standing trustee should consider whether the service provider should have an independent audit of its internal controls over transaction processing. See Statement of Accounting Standards No. 70. Software utilized by the standing trustee for accounting processes should have internal controls.

## **2. Accounting Manual and Systems Documentation**

The uniform recording of transactions is essential to the production of reliable reports. Accordingly, it is essential that instructions be established for processing routine transactions.

Where the records are automated, systems documentation should be maintained. Systems documentation is comprehensive written information about a software system which explains what it does, how it works and how it operates. It enables design problems to be identified and corrected and provides instructions for new users on how to operate the system. A computer user list should be maintained. There are other computer security issues involved. The standing trustee should be familiar with the security issues and implement appropriate controls.

## **3. Security**

The integrity and accuracy of the computerized systems are critical to the administration of cases. Consequently, there are special internal control considerations that arise in a computerized environment. The standing trustee must ensure that the computer system used for chapter 13 case administration, financial reporting, and accounting contains the following security and internal control measures, at a minimum:

- a. The standing trustee should establish unique passwords for each user. Passwords should be changed at least semi-annually or upon termination of a user. Additional password controls are appropriate for certain functions, such as initiating bank account transfers or generating disbursement checks. Software should be capable of identifying the user.
- b. Access to change data fields, such as a creditor's name, address and distribution amounts should be further limited by password or data entry controls to those employees who have a need for access to these fields.

- c. In systems which access bank accounts via modem, the ability to access or to transfer funds should be limited to the standing trustee and one authorized employee.
- d. The software should contain a tamper-proof feature that consecutively numbers checks as they are printed. The software should prohibit the reuse of the check numbers of voided checks. The number sequence on manual checks should not duplicate the computer-generated numbers.
- e. The blank checks should also contain a control number. The standing trustee should maintain a log of these control numbers and account for every check that is used.
- f. The software should prevent the deletion of transactions.
- g. There are other computer security issues involved. The standing trustee should be familiar with the security issues and implement appropriate controls.
- h. "Exception reports ... .. kick out reports," "trace reports" or "error reports" generated by the computer system must be reviewed timely to ensure the integrity of data processed.
- i. The computer should be safeguarded from unauthorized access and use. Computer hardware and software should be in a secure, limited access area. Only authorized users should be able to gain access to the chapter 13 computer programs and data via the terminal network or modem.
- j. The computer program should include automatic edit checks to detect data entry, computer program and other errors.
- k. The system should be backed-up daily. A copy of the backup should be stored offsite weekly. The backup diskette, tape, or other media should be tested or rotated periodically to ensure its continued reliability.

## **F. INTERNAL CONTROL FEATURES**

The standing trustee must establish and maintain a system of internal controls to safeguard trust funds and property, to ensure the integrity of financial record keeping and reporting, and to discourage employee theft.

A strong internal control environment includes, but is not limited to, the components described below:

## **1. Personnel Management**

- a. The previous employment references of prospective employees should be checked by the standing trustee.
- b. The standing trustee must be actively involved in the entire standing trustee operation and must actively supervise employees in the performance of their cash management and accounting duties. Employee fraud indicators are provided at Appendix L.
- c. Documenting routine staff procedures and developing written job descriptions help the standing trustee ensure consistent staff performance.
- d. Unannounced rotation of duties is an important principle of internal control. The rotation should be of sufficient duration to be effective. Rotation of personnel also can be a valuable aid in the standing trustee's overall training program.
- e. Personnel policies should include effective training of employees before assignment to more responsible positions and evaluating and reviewing job performance with each employee. Records of employees' time and attendance should be maintained and reviewed by the standing trustee. Records should also be maintained to document overtime worked for which staff are paid.
- f. The standing trustee should implement a vacation policy which provides that active employees be absent from their duties for an uninterrupted period of not less than one week. In order for this policy to provide an effective internal control, it is imperative that another employee assume the duties performed by the absent individual.

## **2. Segregation of Duties**

The participation of two or more persons in a transaction causes the work of one to serve as proof for the accuracy of the other. Ideally, duties should be arranged so that no one person is responsible for any transaction from inception to termination.

- a. The standing trustee must be actively involved in the process of issuing all checks, authorizing stop payments, and reviewing the monthly reconciliation of the bank statements.

- b. Wherever possible, cash handling duties should be separated from the record keeping functions. Internal controls are strengthened when the following duties are divided among the standing trustee and several employees: receiving and logging receipts in the cash receipts log; restrictively endorsing checks; preparing deposit slips; making deposits; reconciling bank statements; reconciling the cash receipts log to bank statements; and having custody of blank checks. When small staff size precludes segregating duties, the standing trustee must be more actively involved.
- c. Individuals involved in the preparation of trust and expense disbursement checks should not be involved in the mailing process. Segregation of these duties, when possible, avoids access to signed checks by persons capable of inserting improper checks into the disbursement cycle.
- d. Disbursement checks that are returned, because of inadequate address or other reasons, should be processed by an individual not involved with the initial check authorization, preparation or bookkeeping.
- e. In most operations, the standing trustee should consider opening and reviewing the bank statements and canceled checks prior to providing the information to the employee responsible for the bank account reconciliation. Employee(s) involved in the reconciliation process must not have check disbursement responsibilities.
- f. When a facsimile check signing machine is used, procedures designed to overcome the absence of direct signer involvement must be established. Procedures would include sole control of the signature plate by the standing trustee or a single authorized staff person monitoring of the machine's meter indicating number of signatures affixed. Use of a signature stamp would require restriction to a designated person, security of the stamp in a locked safe or compartment and restricted access to the secured compartment.

### **3. Monitoring Bank Accounts and Check Stock**

- a. All trust, expense and other bank accounts should be reconciled monthly. Both the preparer and reviewer should initial and date the reconciliations. Any unusual entries on the bank statements should be investigated. Bank account reconciling items requiring correction should be resolved in a timely manner. Reconciliations must be reviewed and approved by the standing trustee and approval indicated by signature of the standing trustee. The best available verification that detail case records properly reflect overall receipt and disbursement activity is the reconciliation of debtor ledgers with checking and time deposit balances. This reconciliation must be conducted on a monthly basis.

- b. Blank check stock and deposit slips should be kept in a safe or locked file cabinet or room with restricted access to prevent unauthorized access and use. Blank checks should be consecutively numbered either by the bank or by the standing trustee's automated data processing (ADP) system.
- c. Voided checks should be filed numerically with canceled checks or consecutively in a voided check file. In either case, the standing trustee should maintain strong controls over voided checks.
- d. Checks that have been outstanding for more than 90 days (stale-dated) or checks returned by the post office (i.e., for an inadequate address or some other reason) should be processed by an individual uninvolved with initial check preparation and authorization. The checks should be voided and the cause of the problem researched and corrected before the checks are reissued. Documentation should be maintained to verify the efforts undertaken.

#### **4. Receipts**

- a. Upon receipt, currency and checks are to be recorded in the cash receipts log. Checks should be restrictively endorsed in writing or by stamping "For deposit only to \_\_\_\_\_."
- b. Debtor payments should be endorsed immediately upon receipt. Currency and checks must be kept in a safe or locked cabinet until deposited. Funds are to be deposited immediately after receipt.
- c. Debtor payments should be identified, batched and brought under numerical control to ensure that all checks received are deposited.
- d. Debtor payments should be recorded on input sheets, deposit tickets prepared and funds deposited on a daily basis.
- e. Payers should be instructed to makes checks payable to "Office of Standing Chapter 13 Trustee."
- f. Bank lock box systems remove substantially all debtor payments from the standing trustee's office and accordingly represent a strong internal control tool. Advantages and costs of a bank lock box system should be considered.

- g. Creditor overpayments and NSF checks should be formally recorded and monitored until resolved.
- h. Supporting documentation for receipts, such as transmittal letters, sale orders or notices, and reports of sale, must be kept in the financial section of the case file.

## **5. Handling Currency**

- a. The standing trustee should discourage payments in currency.
- b. When the standing trustee cannot avoid accepting currency, the following procedures apply:
  - (1) Provide a pre-numbered receipt to the payer and immediately deposit the funds in the account.
  - (2) If it is not possible to deposit funds immediately, because the standing trustee uses a remote bank, immediately convert the currency to a cashier's check or money order and place it in a secure location until deposited.
  - (3) If currency is received late in the day and it is impossible or impractical to follow the above procedures, secure the funds in a safe or locked drawer until the next business day when these procedures can be carried out. The standing trustee also may want to investigate the possibility of using the bank's night depository or 24 hour services if the bank is not in a remote location.
- c. All supporting documentation in connection with handling currency should be kept together in the financial section of the case file to provide an audit trail. When an employee handles currency, the standing trustee needs to verify that the amount of the check or money order matches the amount of funds initially turned over to the employee.

## **6. Electronic Transfer of Funds**

The standing trustee may be requested to, or, in the case of transfers from governmental entities, may be required to accept electronic transfers of funds from the debtors or from debtors' employers. The standing trustee should be aware that the primary problem arising with such transfers is that of ensuring that the receipt is properly identified to the debtor and case.

Electronic transfers of funds to the standing trustee may be initiated in two ways:

- a. **Transfers Initiated by the Debtor's Employer:** The debtor's employer may request that the standing trustee provide the standing trustee's bank routing number and bank account number in order to effectuate an electronic fund transfer. The employer initiates and controls the timing of the transfer. The standing trustee should be aware that the electronic fund transfer may not have attached the necessary information (i.e. debtor name, case number or debtor address) to identify where the funds are to be applied. Therefore, when the standing trustee is requested by an employer to accept electronic fund transfers, the standing trustee should set up procedures to ensure that the standing trustee receives sufficient information about a transfer to post it to a particular case at the time that the payment is received by the standing trustee.
- b. **Transfers Initiated by the Standing Trustee at the Debtor's Request:** The standing trustee may initiate the transfer of funds electronically from the debtor pursuant to a prior agreement with the debtor. The standing trustee controls the timing of the transfer. To accomplish this transfer, the standing trustee provides the standing trustee's bank with prescribed information that will cause the funds to be drawn from the debtor's account and credited to the standing trustee's account. The standing trustee should consider the fact that payments can be returned for insufficient funds, lack of account or lack of authorization. The debtor has sixty (60) days from the time when the transfer first appears on the bank statement to dispute the transfer. In the meantime, the standing trustee may have received additional electronic fund transfers from that debtor. The standing trustee must then determine whether the other payments which have been received in the interim are authorized.

If a standing trustee is required by law to participate in electronic transfers of funds, the standing trustee must advise the United States Trustee. If the standing trustee elects to participate in this form of fund transfer, the standing trustee must seek authority from the United States Trustee to do so. In either event, it is imperative that the standing trustee evaluate and/or institute internal controls to compensate for any effect on the audit trail of monetary transactions.

## 7. Disbursements

- a. Cashiers' checks may only be used under extraordinary circumstances, upon approval of the United States Trustee. A copy of the cashier's check and related documentation must be maintained in the case file. Counter checks may never be used.

- b. All checks must state that the check will be void if not cashed within 90 days. Stale outstanding checks must be canceled and reissued within 120 days.
- c. Debtor refund, conversion and dismissal payments must be made promptly by check.
- d. Procedures for electronic fund transfers should be discussed with the United States Trustee.

## **8. Maintaining Case Records**

- a. All cases, files, paper and computer accounting records, as well as the computer, should be stored in secure facilities, and not accessible to the public.
- b. The standing trustee should develop and maintain a written office disaster recovery plan for the financial and administrative records, as well as for the computer system and data. Off-site storage of backup files for all critical records should be maintained in the event of natural disaster or physical damage to the premises.
- c. Depending on the type of automated data processing software used, the standing trustee should request that the case records be made available in an ASCII format. If this is not possible, the standing trustee should find out if the vendor will provide an electronic copy of the standing trustee's case records. Either of these features enables standing trustees to transfer data more easily to another software product should the need arise.

## **G. TAXES**

The tax obligations applicable to the standing trustee are generally discussed in this section. The standing trustee should consult with an attorney or accountant specializing in tax issues on any questions relating to tax returns or tax obligations of debtors and/or the standing trustee operation. Payment of such consultants from the expense fund requires prior approval of the United States Trustee.

### **1. Chapter 13 Debtors**

The standing trustee has no obligation to prepare or file tax returns for chapter 13 debtors. Sections 6012(b)(4) and 1398(a) of the Internal Revenue Code (IRC) only applies to a trustee in chapter 7 or to a chapter 11 case involving an individual. Under IRC §1398, when an individual files a chapter 7 or a chapter 11 case, a separate

taxable entity known as the bankruptcy estate is created. In these cases, the trustee is required to file tax returns for the bankruptcy estate. Since the chapter 13 debtor is not subject to the separate entity rules of IRC § 1398, the standing trustee has no obligation to prepare or file tax returns for the chapter 13 debtor.

However, if the debtor's case is dismissed prior to confirmation and the standing trustee has maintained the funds in an interest bearing account and more than \$10.00 in refundable interest has accrued, the standing trustee must file a form 1099-INT.

Converted cases should be reviewed by the standing trustee for any possible taxable events which may have occurred during the administration of the case by the debtor in possession, the chapter 7 trustee or the chapter 11 trustee. The chapter 7 or chapter 11 trustee should have filed all appropriate tax returns at the time of conversion. Any unpaid tax debt incurred by the estate prior to conversion must be addressed in the chapter 13 plan.

## **2. Chapter 13 Operations**

With respect to the standing trustee operation, the standing trustee is required to file all appropriate tax reports with local, state and federal agencies and pay any amounts due. Included in these reports are such items as the employees' W-2 forms, the annual federal unemployment tax report, quarterly federal and state payroll tax reports, quarterly state unemployment tax returns and 1099's as required by law. The standing trustee should regularly review all federal, state and local laws and ordinances to ensure full compliance with all reporting requirements.

In many locations, the standing trustee is not subject to state and local property taxes, but the requirements may vary. The standing trustee is expected to pay any required state or local tax promptly.

## **H. ANNUAL AND AMENDED BUDGETS**

The standing trustee must maintain an accounting system that will, at a minimum, provide the United States Trustee with the revenue and expense detail necessary to calculate the appropriate percentage fee and to determine funds available to pay standing trustee compensation. Budget submissions are to reflect estimated actual and necessary expenses and as such should be based on historical data, competitive bids, market research, and other analytical methods acceptable to the United States Trustee. Budgets will be amended for unanticipated expense amounts that could not be finalized during the annual budget review process. Budgets should not include amounts for items or services for which there is no purchase or implementation date.

The fiscal year for the Chapter 13 standing trustee is October 1 to September 30. The standing trustee is provided a standardized budget form with instructions, available on disk, no later than June 1 of every year. The standing trustee will prepare the budget for the next fiscal year using the most recent financial and caseload information available, relevant market research and competitive bids. Budget estimates must reflect anticipated actual and necessary expenses and should be based on historical data, competitive bids and other analytical methods acceptable to the United States Trustee. The United States Trustee will advise the standing trustee as to the specific date that the budget is to be completed and returned. During the development of the budget, the United States Trustee and the standing trustee should have an ongoing dialogue as to any concerns, issues or requests that the standing trustee would like to address in the budget. This will speed the review process. The 1998 budget form and instructions are included as Appendix M.

The standing trustee will receive, no later than October 1, an Order Fixing Compensation and Percentage Fee (Order) and a memorandum from the United States Trustee as to the approval of the budget for the new fiscal year. If there are unresolved expenditures, the budget will be approved, except for those line items in dispute. (See Chapter 9. I. on Informal Budget Dispute Resolution).

The annual budget represents the standing trustee's best estimate of receipts, disbursements and expenses for the upcoming year. Amended budgets are submitted to document unexpected changes in the operation and request increases or decreases in percentage fees and expenses. Depending on the degree of variance from the original budget, the United States Trustee will advise the standing trustee as to the documentation necessary to support an amendment. For example, in the case of minor changes to budget line items, the United States Trustee may accept a letter of explanation. The standing trustee will receive written notification from the United States Trustee of approval or disapproval of changes to the budget line items. If the amended budget requires a change in the compensation or percentage fee, the standing trustee will receive a new Order and a letter from the United States Trustee advising as to the approval of the expenditure.

The standing trustee is required to submit an amended budget for approval for any budget deviations which cause:

- a change in the standing trustee's compensation or percentage fee;
- any increase in employee expenses (except for overtime and benefits relating to overtime);
- any increase in an employee's salary;
- any payment to a standing trustee, a relative of a standing trustee or an entity in which a standing trustee has a financial or ownership interest (see Chapter 4)
- any increase in lease payments; or

-any previously unbudgeted item.

However, except as to the above items, an amended budget is not required for any deviation in a particular summary line item from the last approved budget less than 10% or \$3,000, whichever is greater.

This provision does not supersede applicable requirements for the standing trustee to obtain approval from the United States Trustee for a proposed expenditure.

## 1. Operating Expense Line Items

The standing trustee may make necessary preapproved expenditures from fiduciary expense funds to administer the cases efficiently and effectively. Expenses must be reasonable, actual and necessary; relate to the duties of the standing trustee; and be supported by appropriate documentation. Expenses must be paid each month before the standing trustee's personal compensation is paid. The following budget categories are explained:

- a. **Employee Expenses:** Charges for salaries and wages, including overtime and bonuses paid directly to employees, amounts withheld for the employees' share, and amounts paid for the employer's share of benefits, taxes, etc. Except as provided in the Final Rule on Qualifications and Standards for Standing Trustees, 28 CFR § 58.4(d)(1)[see Appendix A], the standing trustee shall not employ a relative of the standing trustee. The standing trustee also shall not employ a relative of the United States Trustee or of an Assistant United States Trustee in the region in which the standing trustee has been appointed or a relative of a bankruptcy court judge or of the clerk of the bankruptcy court in the judicial district in which the standing trustee has been appointed.

The standing trustee must have a written position description for each employee. These position descriptions should itemize all duties performed by each employee with sufficient clarity and detail that the positions described can be categorized for purposes of determining salary, benefits, and promotion. Position descriptions for new positions, and all revised descriptions, must accompany the annual budget when submitted.

The standing trustee shall develop, and the United States Trustee shall approve, salary ranges for each position category and state whether the position is exempt or nonexempt for purposes of overtime. The salary ranges provide the standing trustee and the employee with an established and appropriate entry level and maximum level of compensation for each position. They also document the skill

levels, efforts and managerial obligations necessary for raises and promotions. These ranges reflect the local market for a position requiring the same or similar skills for the same number of hours. The standard practice is to base salaries on a 40-hour work week. In addition to the position descriptions currently required to be submitted to the United States Trustee, the standing trustee also submits proposed amended pay charts.

In general, the standing trustee should not provide pay raises more than once per year. The date selected, a new calendar year, a new fiscal year, or the employee's anniversary date, should be used every year.

The standing trustee may develop an overall employee benefits package no greater than that provided in the community in which the standing trustee's operation is located for similarly sized service businesses (i.e., number of employees). The standing trustee should consider common cost-cutting measures such as co-payments for health insurance and Health Maintenance Organizations (HMO's) and shall demonstrate in writing, to the satisfaction of the United States Trustee, that the total compensation and benefit package provided to employees is commensurate with compensation and benefits packages provided for the same or similar positions in similarly-sized service businesses in the community. The standing trustee shall provide to the United States Trustee a listing of each benefit and the cost to the fiduciary expense fund of each benefit. Ceilings on the amount of leave that may be accrued also should be disclosed.

Employee salaries and benefits will be reviewed and monitored to ensure they are commensurate with services performed, but shall not exceed the limitations in 28 U.S.C. § 586(e). The standing trustee may request to retain an outside compensation consultant approximately every five years to ensure that the compensation (salary and benefits) system remains comparable to the local market. No employee of a standing trustee may receive compensation and benefits of a value greater than compensation of a standing trustee for standing trustee duties. If the standing trustee wishes to increase the compensation and benefits of an employee in a manner inconsistent with the approved compensation system during any twelve month period, the standing trustee shall provide the United States Trustee with an appropriate amendment to the budget, including a written justification for the increase, and wait for the United States Trustee to approve the change. The applicable position description must accompany the amended budget.

The standing trustee must receive prior written approval from the United States Trustee to increase the number of positions.

- b. **Office Rent and Utilities:** Charges for rental of office space, including conference rooms, garage space, and storage space; charges for utilities should include the service of heat, water, gas and electricity to the extent they are not included in the rental charge. Office rent for the standing trustee should be reasonable and at or below the local market rate for comparable space. When moving into new office space or renewing a lease, the standing trustee is to obtain rental rates for comparable space to ensure that the contract rate is at or below the market rate. Other factors considered when leasing space include ease of access for debtors and location to the court. The amount of leased space also must be reasonable and necessary to carry out the standing trustee's duties. While it is difficult to formulate a rule of thumb that applies to all situations and recognizing that there may be variations, it is suggested that the standing trustee rent total space of approximately 250-350 square feet per person, excluding space for § 341(a) meeting rooms and offsite storage.

Cost savings are usually realized when the standing trustee is able to commit to a period of time exceeding one year. However, given changes in caseload, court locations and other factors, long term leases are not advisable. Leases whose terms extend beyond five years are discouraged.

- c. **Bookkeeping/Accounting Services:** Charges incurred for all outside bookkeeping and accounting services necessary for the operation of the standing trustee's office, including charges for preparation of payroll, payroll taxes, annual reports, and reconciliation of bank accounts. Charges in this category vary due to the composition of the standing trustee's staff. For example, some standing trustees prefer to have a bookkeeper on staff, which reduces or eliminates the need for this service.
- d. **Computer Services:** Charges for services for the development, maintenance, and modification of software systems, processing fees, data preparation, conversion of data to another system, purchase of software programs, consulting, and research and development, including initial processing fees charged by a computer firm. This expense item does not include expenses related to training, hardware, postage for noticing, or supplies.

The United States Trustee does not endorse or recommend any particular computer system or provider, as long as all Handbook requirements are met.

- e. **Audit Services:** Charges incurred for the services of any independent audit firms. Each standing trustee will have at least one audit per year.

- f. **Consulting Services:** Charges incurred under contract with individuals for services by attorneys, appraisers, and other professionals. Each consultant and area of expertise must be specifically identified in the budget. Prior approval from the United States Trustee of any employment or retention of an outside professional is required. A standing trustee may budget a sum of money to pay for anticipated services rendered by attorneys and other professionals in the course of administering cases as distinguished from services arising from the appointment of attorneys or other professionals under 11 U.S.C. § 327. The standing trustee should evaluate and be prepared to justify any request to hire outside consultants when (1) the service appears capable of being handled by staff employees or (2) the cost of hiring an employee to provide the services would be more economical.

Most consulting services that exceed \$2,500 require the standing trustee to receive three price quotes. On renewable contracts, such as bookkeeping services, the standing trustee may ask for costs over a three-year period to avoid an annual bidding process. The United States Trustee may waive the requirement for three price quotes for legal expenses. The requirement may also be waived by the United States Trustee if the standing trustee is able to show that three sources for price quotes were not available. See Chapter 9. H. 2., *infra*.

If the standing trustee is sued or threatened to be sued, and (1) the conduct complained of appears to have been performed within the scope of the standing trustee's official duties and (2) the United States Trustee determines the use of trust funds to defend the allegations under the facts presented is a necessary expense incurred in the administration of the standing trustee's cases, the United States Trustee may authorize the standing trustee to use fiduciary expense funds to pay for extraordinary legal expenses.

The standing trustee is to submit a written request to the United States Trustee for payment or reimbursement of the legal expenses at the earliest practicable time. Disclosure in the standing trustee's annual budget is not considered a written request for approval for purposes of this provision. The written request should contain the following information: (1) a detailed summary of the facts surrounding the challenged conduct; (2) the amount, terms and conditions of any retention agreement for counsel; (3) copies of all relevant documents, including letters, pleadings, and other information the United States Trustee deems appropriate; and (4) a budget describing the legal services to be performed with the anticipated costs and charges of the services.

The request for payment of the legal expenses will be re-evaluated each quarter and conditioned upon the review by the United States Trustee of a written quarterly status report from the standing trustee, or the standing trustee's counsel, together with additional documents the United States Trustee may request, showing that the legal expenses continue to be actual and necessary expenses of the trust operation.

Legal expenses incurred by the standing trustee in connection with actions initiated by or against the standing trustee by or against the United States Trustee are personal to the standing trustee and do not constitute actual and necessary expenses of administering a standing trustee's cases.

- g. **Noticing:** Charges incurred in providing noticing to interested parties, including postage, supplies and processing costs.
- h. **Telephone:** Charges for phone service.
- i. **Postage:** All postal charges and rental of post office boxes, except those related to noticing.
- j. **Office Supplies:** Charges incurred for consumable supplies and other property of little monetary value, such as hand-held calculators, except those related to noticing.
- k. **Bond Premiums:** Fees for premiums on surety bonds, including any premiums paid to bond an employee.
- l. **Clerk Fees:** Does not include any filing fees or other court costs that are provided to be paid under the plan.
- m. **Publications and On-Line Services:** Charges for subscriptions to and copies (paper or on-line) of journals and periodicals, books and directories as pertinent to the duties of the standing trustee. Includes charges related to on-line research services, including PACER and Internet. Standing trustees should consider the necessity of obtaining both hard copy and electronic versions of the same document.
- n. **Insurance, other than Employment Related:** Charges for premises liability insurance for the office of the standing trustee (such as fire, theft, accidental injury to property or third persons), workers' compensation insurance, errors and omissions insurance, and employment practices insurance. The

standing trustee must maintain adequate insurance on the physical assets that are property of the office of the standing trustee. Policies for errors and omissions insurance and employment practices insurance must meet the minimum requirements established by the United States Trustee system. Costs of different types of insurance are to be identified separately. See Appendix N for minimum guidelines for errors and omissions insurance and Appendix O for requirements of employment practices liability insurance.

- o. **Training Expenses:** Job-related training of standing trustees and their employees is encouraged.

**(1) Training not Sponsored by the United States Trustee:** A standing trustee may use up to one percent of the fiscal year operating expense fund or \$5,000, whichever is greater, to provide training for employees and the standing trustee. A standing trustee does not have to receive preapproval for training expenditures so long as they meet the following conditions: (1) all expenses associated with the training (such as conference registration, textbooks, travel, meals, lodging) are included in the training line item of the budget; (2) courses, seminars, and training sessions for the standing trustee and employees are directly related to the duties of the standing trustee or employee; and (3) the expenses are reasonable and necessary.

The standing trustee is to attach to the annual report for each fiscal year a report listing each seminar, person attending, and cost. Training required by the United States Trustee is not included in the training allowance. If the standing trustee deems it necessary to spend an amount in excess of the training allowance, the United States Trustee may authorize an additional amount upon a proper showing by the standing trustee. For example, a newly-appointed standing trustee (within the first three years of appointment), especially one with new staff, may need more job related training than allowed by the allotment and should submit a training plan with costs to the United States Trustee.

**(2) Training Sponsored by the United States Trustee:** Expenses incurred in attending training provided by the United States Trustee are not included in the training allowance. Travel expenses for NACTT Liaison Committee members, and other members of the NACTT for attendance at committee meetings, board meetings, and executive meetings is not an allowable expenditure from the standing trustee's expense funds unless such meetings are with and at the request of the Executive Office for United States Trustees or held in conjunction with the Annual NACTT National Conference. If approved, such expenses are not included in the training allowance.

- p. **Debtor Education:** Charges for programs designed to assist the debtor in performance of obligations under the plan and in the development of financial management skills. This category includes all costs associated with the program except employee expenses.
- q. **Maintenance and Service Agreements:** Charges incurred for the repair and maintenance, or service agreements covering such repair and maintenance, of the office suite and office equipment, including all office machines, computer hardware and furnishings, and including charges for custodial services when not included in the basic lease agreement.
- r. **Photocopy Services and Transcripts:** Charges incurred for photocopying, printing and purchase of transcripts and court reporting services necessary for the administration of chapter 13 cases.
- s. **Travel:** Charges incurred for official travel necessary for the administration of chapter 13 cases including airfare, mileage, meals, lodging and other costs incurred as related to official travel. Travel costs related to training are considered training expenses and are reported under that line item.

Mileage reimbursement for use of a personal automobile for necessary travel beyond the usual place of business is authorized at the rate allowed by the Internal Revenue Service. While a long-term lease or the purchase of an automobile with fiduciary expense funds is not authorized, short-term car rentals may be appropriate if cost effective. Reimbursement for meals is authorized if the official travel causes the standing trustee or an employee to be away from the office for more than ten consecutive hours. Reimbursement for lodging is authorized if a standing trustee or employee travels more than 50 miles from the office and an overnight stay is necessary.

- t. **Equipment/Furniture Rental:** Charges for the use of equipment owned by another, including copiers, audio and visual aid equipment, rental of computer systems and software, printers, postage meters, mailing machines, furniture, typewriters, calculators/bookkeeping machines, and file cabinets. Total rental charges incurred over the life of the lease should be weighed against the total purchase price of comparable equipment or furniture.
- u. **Equipment/Furniture Purchases:** Charges for purchase of furniture and equipment including desks, tables, chairs, file cabinets, postage meters, typewriters, calculators, computers, including software and hardware, and any

charges for services in connection with initial installation when performed under contract. Equipment and furniture purchased with chapter 13 funds may be used only for the administration of chapter 13 cases by the standing trustee and any successor of the standing trustee.

- v. **Leasehold Improvements:** Charges incurred for space adjustments (including partitioning), alterations, fixtures and improvements to a building or office suite, as approved by the United States Trustee.
- w. **All Other Expenses:** Includes all expenses not otherwise classified, such as lockbox expenses, moving expenses, state and local taxes. The standing trustee may hire temporary personnel if authorized by the United States Trustee as part of the budget process; however, the use of temporary personnel as a standard procedure for hiring new employees is not appropriate if it results in significant placement charges and turnover.

Items such as the following are not authorized expenditures: flowers, alcohol, food, party supplies, gifts, dues or membership fees for professional organizations, fines for parking or traffic violations, and tax penalties (e.g., penalty for failing to pay employee taxes timely).

## 2. Major Expenditures

The standing trustee must obtain approval of the United States Trustee for a purchase of over \$2500 or more.

The standing trustee shall obtain a minimum of three price quotes, if available, when requesting the United States Trustee to approve a purchase of \$2,500 or more or a lease of personal property that exceeds \$5,000 over the term of the lease. Similarly, consulting contracts, other than for legal services, in the amount of \$2,500 or more require three or more price quotes. Pages 9-21 and 9-22.

This provision is designed to encourage competition among vendors of furnishings, computer equipment, other major expense items and among consultants. It is recognized that the lowest bid may not necessarily be the most cost-effective choice for a standing trustee's needs. If fewer than three vendors or consultants are able to provide the product needed, a standing trustee should demonstrate to the United States Trustee's satisfaction all efforts to find other sources.

## 3. Operating Reserve

The standing trustee, with approval of the United States Trustee, may carry over from one year to the next up to seventeen percent (17%) of the authorized expense fund, less standing trustee compensation. For purposes of § 586, the operating reserve is considered an actual, necessary expense and part of the standing trustee's budget. Because the standing trustee is on a cash basis of accounting, an operating reserve provides for funds to meet ongoing obligations in the first part of the new year.

The operating reserve also may be used to pay creditors the amount of any misdisbursement. The standing trustee must receive authorization from the United States Trustee and must have documented reasonable efforts to recover a disbursement paid to the wrong party. Before requesting to use funds from the operating reserve, the standing trustee should look to the operation's errors and omissions insurance policy to determine if the misdisbursement exceeds the deductible.

Finally, the operating reserve may be used in extraordinary circumstances, all of which require prior approval by the United States Trustee. For example, when a determination has been made to create an additional standing trustee operation, the United States Trustee has several options, including dividing the current operation and appointing an additional standing trustee in the district. In such a situation, the existing standing trustee operation may increase its operating reserve in the expectation that a portion of the reserve will be transferred to help fund the new standing trustee operation during the start-up period.

Any amount over the 17% limit must be paid to the United States Trustee System Fund ("Fund") pursuant to 28 U.S.C. § 586(e)(2). The standing trustee should monitor receipts and disbursements on a monthly basis. When funds on hand are estimated to approach or exceed the 17% limit, the standing trustee must contact the United States Trustee and request a reduction in the percentage fee.

#### **4. Co-Trustee Operations**

The United States Trustee will not approve expenses to establish a new co-trustee operation. The commingling of financial and operational systems does not allow the United States Trustee to hold either standing trustee clearly accountable. In the event of financial or administrative deficiencies, the conduct of one trustee is indistinguishable from the other trustee in a co-trustee arrangement. In addition, the cost of the second trustee is unnecessary because there is no operational distinction between a co-trustee and a single trustee operation. Co-trustee operations in existence as of October 1, 1996, are not affected by this prohibition.

#### **5. Facilities and Equipment**

The standing trustee shall not lease or sublease to another entity any office space or equipment that has been paid for or acquired with fiduciary expense funds.

If the standing trustee has acquired excess space or equipment that is not necessary for the administration of the cases, the standing trustee should attempt to sell it, to renegotiate the lease, or otherwise to dispose of it in a commercially reasonable manner.

This provision does not prevent the standing trustee from assisting another standing trustee with the approval of the United States Trustee.

## **I. INFORMAL BUDGET DISPUTE RESOLUTION**

In the event that the standing trustee and the United States Trustee have a budget dispute that they are unable to resolve by negotiation, either party may utilize the Informal Budget Dispute Resolution Procedure. The procedure and forms are set forth in Appendix P. The procedure may apply to annual and amended budget disputes.

# **CHAPTER 10**

## **AUDITS, REVIEWS AND RECORDS**

## **CHAPTER 10 - AUDITS, REVIEWS AND RECORDS**

### **A. INDEPENDENT AUDITS**

#### **1. Purpose and Frequency**

Audits are the starting point for determining the adequacy of the standing trustee's financial management, internal control procedures, and organizational support and are part of the annual evaluation process. The annual report of the standing trustee shall be audited annually by an independent audit firm. The audit is designed to determine the adequacy of internal controls over these monies and the accuracy of amounts and disclosure in the annual reports and compliance with program policies and guidelines. In addition to annual audits, there may be unusual circumstances that lead to a less-than-full-year independent audit, such as resignation, death or removal of the standing trustee or the misappropriation of funds by an office employee.

#### **2. Selection and Compensation of the Audit Firm**

The audit firm is selected by a panel consisting of the Assistant Director for Review and Oversight and one or more United States Trustees. The expense of the annual audit is paid from chapter 13 expense funds unless the Assistant Director for Review and Oversight determines that, because of unique circumstances, the United States Trustee program will pay for the audit.

#### **3. Entrance Conferences**

The standing trustee should bring any issues or extraordinary items to be reviewed or reported to the attention of the auditor(s) before the conduct of the audit.

#### **4. Exit Conferences and Follow Up**

At the completion of the audit, the auditor, standing trustee, and the United States Trustee participate in an exit conference. The auditor will explain the results of the examination and may make recommendations to improve internal controls, record keeping, and, if applicable, case administration procedures.

A written report on the results of the audit is issued within 30 days of the exit conference. The United States Trustee will forward the report to the standing trustee. Within 45 days of the date of the written audit report, the standing trustee must submit a written statement confirming that corrective action has been taken on noted deficiencies and changes implemented. Upon resolution of the issues, the audit will be

closed. The United States Trustee will recommend to the Assistant Director for Review and Oversight closure of the audit and provides copies of the supporting correspondence between the United States Trustee and the standing trustee.

Whenever an audit report contains a consequential finding or a series of less consequential findings, the United States Trustee shall, within three months of the standing trustee's response, make an on-site visit to the standing trustee's office to verify compliance. There are certain findings that require the United States Trustee to seek documentation and/or make an on-site visit to the standing trustee's office to verify compliance. These findings include:

- a. Insufficient computer security, including lack of restriction on internal software edits.
- b. Nonexistent, inaccurate, incomplete or untimely bank reconciliations.
- c. No restrictive endorsement of debtors' checks.
- d. Lack of procedure to verify control over receipts.
- e. Lack of receipt policy for hard currency remittances.
- f. Inadequate control over facsimile check signing machine and signature stamp.
- g. Insufficient documentation of expenses.
- h. Inadequate oversight of cash related transactions and employee delegated responsibilities in maintaining financial records.
- i. Failure to make timely disbursements to creditors.

Weakness in internal controls creates a very serious situation that can lead to trust funds being at risk. Resolution of audit deficiencies is an integral duty of the standing trustee.

Failure to implement necessary changes shall result in appropriate remedial action by the United States Trustee. The resolution of audit findings shall be completed within six months of the audit report.

## **B. MANAGEMENT REVIEWS**

The audit of the annual report may be supplemented by a management review performed by the United States Trustee at the trustee's office. The objective of this type of review is to assess the standing trustee's performance in specific areas, such as case administration, case closing, claims reviews and personnel management. The standing trustee will be advised approximately two weeks in advance of when the review will be conducted. The standing trustee will receive a letter from the United States Trustee discussing the review findings and must provide a written response. The standing trustee must have all records available and make every effort to ensure that all appropriate employees are on hand.

### **C. RETENTION OF RECORDS**

Individual case cash receipts and disbursement ledgers must be retained for not less than seven years from the date of filing of the case. The standing trustee's general ledger supporting each year's Annual Report must be retained for a period of not less than seven years.

The standing trustee must maintain all bank records, including bank statements, monthly bank reconciliations, canceled checks, and deposit slips, separate from individual case files and in chronological order, for a period of not less than seven years.

Individual case cash receipts and disbursement ledgers, general ledgers, and the cash receipts and disbursement journal may be transferred to computer disk storage, diskette, or any other similar computerized form of record two years after the annual report covering those transactions has been submitted. Bank records also may be transferred five years after the report is submitted.

Individual case files must be retained for at least two years after an order closing the case and discharging the standing trustee is entered by the court. The decision whether to maintain case files more than two years after closing should be based on the standing trustee's individual need to refer to the file for subsequent inquiries from creditors or debtors. If the standing trustee has possession of original court documents, such as proofs of claim, the disposition of these should be in accordance with the guidelines or directives from the court or the clerk.

The United States Trustee maintains the § 341(a) meeting tapes unless the United States Trustee delegates in writing that responsibility to the standing trustee. If so delegated, the standing trustee shall maintain the tapes for a period of not less than two years from the date of the § 341(a) meeting. The tapes will be stored in a secure cabinet in chronological order. The standing trustee must make copies of the tapes available to any party in interest requesting a copy of the tape and the original tape of any meeting must be turned over to the United States Trustee or the court upon request.

## **CHAPTER 11**

# **TRUSTEE COMPENSATION AND BENEFITS; CALCULATION OF PERCENTAGE FEE**

## **CHAPTER 11 - TRUSTEE COMPENSATION AND BENEFITS; CALCULATION OF PERCENTAGE FEE**

### **A. PAYMENT OF TRUSTEE COMPENSATION AND BENEFITS**

Pursuant to 28 U.S.C. § 586(e), the Attorney General fixes a maximum annual compensation for the standing trustee. This maximum annual compensation, including benefits as a percentage thereof, is fixed on an annual basis after submission and approval of the standing trustee's budget. The actual maximum allowable compensation pursuant to 28 U.S.C. 586(e) as amended, is the lesser of:

Maximum compensation, inclusive of benefits, as fixed by the Attorney General; or 5% of payments to be received under plans [28 U.S.C. § 586(E)(2)(a)]; or funds available for compensation [excluding prior year's operating reserve]. The statute provides that the Attorney General shall fix a maximum annual compensation, which includes the cash value of employment benefits. Therefore, the benefit portion of maximum annual compensation is paid to the standing trustee in the form of cash.

The maximum annual compensation of a standing trustee, including the benefit cash allowance for a particular fiscal year, is calculated by prorating the salary level fixed for each portion of the fiscal year. A standing trustee must pay all approved actual and necessary expenses before a standing trustee may receive compensation. While unpaid expenses may be carried over to the next year, unpaid compensation may not. Therefore, no portion of the standing trustee's operating reserve carried forward from the prior year may be utilized to pay the standing trustee's compensation. The annual compensation, including the cash value of benefits, can only be paid pro rata on a monthly basis throughout the year after expenses are paid and it may not be paid in advance.

### **B. CALCULATION OF PERCENTAGE FEE**

A standing trustee's percentage fee is fixed by the Director by delegation from the Attorney General, after consultation with the United States Trustee for the region in which the standing trustee serves, pursuant to 28 U.S.C. § 586(e). The standing trustee has no authority to negotiate a percentage fee other than that fixed by order of the Director.

The percentage fee is applied to all payments received by the standing trustee from the debtor under the plan. Thus, on a \$1,000 payment received from a debtor, a standing trustee whose percentage fee is 6% would pay \$60 to the standing trustee's expense account and disburse \$940 to creditors.

If the plan provides for payment of a sum certain on claims, the standing trustee and debtor must work backwards to calculate the debtor's payment to the standing trustee. To calculate the debtor's payment which will result in the payment of a sum certain, the sum certain must be divided by the difference between 100% and the standing trustee's percentage fee. For example, a plan may provide for the payment of \$500 each month to a secured creditor. If the standing trustee's percentage fee is 6%, the \$500 creditor payment is divided by .94. The resulting monthly payment from the debtor under the plan is \$531.91. Six percent of \$531.91 yields a standing trustee fee of \$31.91, leaving \$500 to be disbursed to creditors.

Percentage fees are to be paid to the standing trustee's expense account at the time of disbursements under the plan and not at the time of receipt of the payments by the standing trustee, except for payments of § 503(b) awards under § 1326(a)(2), which should be transferred to the standing trustee's expense account when return of funds to the debtor is made.

**CHAPTER 12**

**COMPLIANCE MEASURES**

## **CHAPTER 12 - COMPLIANCE MEASURES**

### **A. REMEDIAL AND ENFORCEMENT ACTIONS**

The standing trustee is a fiduciary held to very high standards of honesty and loyalty. The standing trustee who fails to maintain this high standard or who is otherwise deficient in the administration of cases will be subject to a wide range of corrective action by the United States Trustee.

If the nature of a standing trustee's actions reflect dishonesty, deceit, fraud, or serious mishandling of estate funds, a single substantiated incident justifies immediate action by the United States Trustee to protect the assets of the standing trustee operation and the funds. The remedies considered by the United States Trustee include motions to remove the standing trustee from all cases, temporary restraining orders, orders for turnover of books and records, and referral to the United States Attorney and state licensing authorities.

Trustee conduct that does not constitute dishonesty, fraud, or immediate asset risk merits the use of progressive or cumulative remedies that range from meetings with the trustee to filing motions to compel an action, seeking disgorgement or surcharge, temporarily suspending the trustee, or seeking to permanently remove the trustee from all cases. Imposition of these remedies is at the discretion of the United States Trustee. The types of conduct that may warrant one or more of these remedies include substandard reporting or asset investigation efforts, repeated instances of underbonding, inadequate internal controls, or weak case administration. Disgorgement, surcharge, disallowance of fees, and the imposition of sanctions also are remedies pursued by the United States Trustee when appropriate.

#### **1. Reduced Compensation Order**

With respect to budget disputes, zero or reduced compensation orders will be issued when, and only to the extent that, a standing trustee expends trust funds without prior approval of the United States Trustee or prior to the final resolution of any disputed budget amount. If there is an unresolved dispute between the standing trustee and the United States Trustee concerning a particular budget item, the parties will explore resolution of the dispute by informal means or use applicable formal dispute resolution procedures. Pending final resolution of the dispute, the standing trustee will not expend trust funds for any disputed portion of a line item. If the trust funds are expended without final approval, the expense fund may be reimbursed by deduction from the standing trustee's future compensation.

In rare instances, the United States Trustee may request that the Director set the compensation level at zero if a standing trustee fails to undertake satisfactory efforts to correct serious deficiencies, other than budget disputes, where other alternatives do not sufficiently address the deficiency, that have been noted by the United States Trustee. A zero compensation order may be used until the deficiencies are corrected.

## **2. Termination of Case Assignments**

Termination of future case assignments may occur where, for example, the trustee demonstrates a failure to properly administer cases, or refuses to cooperate with the United States Trustee or to adhere to applicable policies.

## **3. Removal**

The standing trustee's inability to administer cases may also result in the United States Trustee filing a motion under 11 U.S.C. § 324 to remove the trustee from all existing cases. The clearest case for removal is the discovery of fraud or embezzlement; however, other kinds of mismanagement, misconduct or unsatisfactory performance may form the basis for removal.

## **4. Recovery of Unauthorized Expenses or Excess Compensation**

If the standing trustee takes excess compensation in violation of a compensation order, takes all compensation prior to the end of the year, improperly receives compensation by some other means, or makes unauthorized expenditures, the United States Trustee will demand that the funds be returned. If the standing trustee fails to promptly repay the sums demanded, the United States Trustee will inform the Director with a recommendation for further action, including the reduction of compensation, termination of future case assignments, or bringing a removal action or a suit against the trustee and the trustee's surety.

## **B. PROCEDURES FOR SUSPENSION AND TERMINATION (28 C.F.R. § 58.6)**

The United States Trustee will notify a standing trustee in writing of any decision to discontinue the assignment of cases. The standing trustee may appeal the United States Trustee's decision to the Director by filing a request for review within twenty (20) days. If no appeal is taken, the United States Trustee's decision is final and not subject to review. Appendix A.